LIBRARY
SUPREME COURT, U. S.

APPENDIX

FILED
JUN 20 1973
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-6852

DONALD PAUL LUBIN, ETC.

Petitioner,

—v.—

LEONARD PANISH,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF CALIFORNIA

PETITION FOR CERTIORARI FILED JUNE 16, 1972
CERTIORARI GRANTED MAY 7, 1973

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-6852

OCTOBER TERM, 1972
DONALD PAUL LUBIN, ETC.

Petitioner,

—v.—

LEONARD PANISH,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF CALIFORNIA

INDEX TO APPENDIX *

	Page
Certificate of Clerk (omitted in printing)	1
Docket Entries	1
Petition for Writ of Mandate	2
Declaration of Donald Paul Lubin	9
Memorandum of Points and Authorities	11
Demurrer and Points and Authorities	20
Order Denying Petition for Writ of Mandate	38
Order of the Supreme Court granting the motion for leave to proceed in forma pauperis and granting the petition for writ of certiorari	39

[Clerk's Certificate Omitted in Printing]

DOCKET ENTRIES

Petition for Writ of Mandate, Declaration of Donald Paul Lubin, and Memorandum of Points and Authorities filed March 16, 1972

Demurrer and Points and Authorities filed March 20, 1972

Order Denying Petition for Writ of Mandate filed March 22, 1972

[Title Page Omitted in Printing]

CALIFORNIA SUPREME COURT

No. ———

[Attorneys' Names and Title of Cause Omitted in Printing]

PETITION FOR WRIT OF MANDATE

Petitioner DONALD PAUL LUBIN petitions this Court for a Writ of Mandate directed to respondent JAMES S. ALLISON, Registrar-Recorder of the County of Los Angeles, and by this certified petition alleges:

FIRST CAUSE OF ACTION

I

Petitioner DONALD PAUL LUBIN is, and at all times mentioned in this petition was a citizen, voter, and candidate for nomination to election to the Board of Supervisors for Los Angeles County who cannot afford the filing fee required for said office, as indicated by the affidavit filed herein. He brings this petition individually and on behalf of all citizens, voters and candidates and others similarly situated who are too numerous to be named and brought before this Court as petitioners. Petitioner meets the legal qualifications to have his name placed on the ballot as a candidate, except that he is unable to pay the filing fee. As a citizen, voter, and candidate, petitioner is within the class of persons beneficially interested in respondent's faithful performance of his legal duty hereafter alleged.

II

Respondent JAMES S. ALLISON is the Registrar-Recorder of the County of Los Angeles, and as such, is charged under the provisions of California Elections

Code Sections 6551 and 6554 with the initial collection of filing fees for political candidates. He is the person who certifies candidates for Los Angeles County supervisorial districts whose names shall appear upon the ballots in general and primary elections.

III

In order to appear on the ballot in a primary election, a candidate must: (a) deliver a prescribed "Declaration of Candidacy" or, in the alternative, a prescribed "Declaration of Candidacy by Sponsors," accompanied by a "Declaration of Acceptance of Nomination," to the County Clerk of the County in which he resides no later than 74 days before the primary election is to be held; and (b) deliver the required number of "Sponsors' Certificates" for the particular office he seeks to the County Clerk of the County in which he resides no later than 74 days prior to the date of the primary election. For the office of County Supervisor, the Declarations of Candidacy and accompanying Sponsors' Certificates shall be accepted by the County Clerk for filing in his own office.

All forms required for nomination and election to all County offices are furnished only by the County Clerk of the County in which the candidate resides. At the time of issuance of those forms, the County Clerk is directed by statute to type onto the forms the name of the candidate and the office for which he is a candidate, and to imprint a stamp which reads "Official Filing Form," and to affix his signature. The official forms so prepared are to be distributed only upon the prepayment of the filing fees provided for in Section 6554 of the California Elections Code. The filing fees are not to be refunded in the event that the candidate fails to qualify as a candidate. The County Clerk is directed to transmit the collected filing fees to the County Treasurer.

IV

On or about February 15, 1972, petitioner appeared at the office of respondent JAMES S. ALLISON to apply

for and secure a Declaration of Candidacy, Certificates of Sponsors, a Statement of Qualification, and all other necessary nomination papers requisite for his candidacy for the Board of Supervisors for Los Angeles County.

Petitioner demanded that said nomination papers be provided him by said respondent, but petitioner was refused the issuance of said nomination papers orally and in writing solely because petitioner was unable to pay certain filing fees required by Sections 6551 and 6554 of the California Elections Code. Said fees are $701.60 for a candidate for Board of Supervisors of Los Angeles County.

V

The refusal of respondent was void, unconstitutional, and beyond the power or jurisdiction of respondent and a prejudicial abuse of discretion in that the filing fee requirement and the enforcement thereof serve to deny to the petitioner and members of his class, the opportunity to seek public office solely because of their economic station and constitutes an invidious discrimination against the poor citizens of our society. This denial of the right to seek public office deprives petitioner and members of his class the equal protections of the laws as guaranteed by the Fourteenth Amendment of the United States Constitution. Further, the refusal of respondent denies petitioner and all members of his class the opportunity to vote for candidates of their choice solely because their candidates may be too poor to pay the requisite filing fees. This, too, deprives petitioner and members of his class of the equal protections of the laws as guaranteed by the Fourteenth Amendment of the United States Constitution, and the right of free expression and association for the advancement of political beliefs guaranteed by the First and Fourteenth Amendment.

VI

Notwithstanding the demands of petitioner that respondent perform the acts set forth herein, respondent wrongfully failed and refused and continues to fail and

refuse to issue to petitioner the necessary nomination papers for candidacy to the Board of Supervisors of Los Angeles County. Unless compelled to do these acts by this Court, respondent will continue to fail and refuse to do so.

VII

That heretofore on February 17, 1972, petitioner with others filed a Petition for Writ of Mandate, Case No. C-23138 in the Los Angeles County Superior Court, and an Alternative Writ of Mandate and a Temporary Restraining Order were issued by Judge John Cole for hearing on March 6, 1972, in Department 65.

At said hearing, Judge Robert A. Wenke denied the Writ of Mandate.

VIII

That immediately thereafter, petitioner and others filed a Petition for Writ of Mandate, Case No. 39950, in the Court of Appeal, 2nd District. That it was denied by postcard decision on March 9, 1972.

IX

That on March 9, 1972, a Federal three-man Court sitting in San Francisco in the case of *Chote* vs. *Edmund G. Brown, Secretary of State,* declared Congressional and State filing fees to be unconstitutional with respect to indigents.

X

That on March 10, 1972, petitioner believes, and alleges on the basis of said belief, a telegram was sent to respondent by Edmund G. Brown, Secretary of State and Evelle J. Younger, Attorney General, instructing him not to collect fees for Congressional and State offices from persons swearing that they were indigents.

XI

That on March 10, 1972, respondent, on the advice of County Counsel John Miharag, accepted for filing without fees the nomination papers of all of the Petitioners in the aforementioned actions in Los Angeles Superior Court and Court of Appeal with the exception of petitioner; as to petitioner who was running for a local office, respondent accepted the nomination papers, but stated that he would not file them until ordered to do so by a Court.

XII

That the Court Reporter on the request of counsel prepared her notes of the hearing before Judge Robert A. Wenke on March 6, 1972 and said notes were deposited with the Court of Appeal. Counsel will request that they be transmitted with this Petition.

XIII

Petitioner has no plain, speedy, and adequate remedy at law other than the relief sought in this petition. The fact that the ballot is to be printed by March 28, 1972, underscores petitioners' lack of adequate and speedy remedy.

XIV

As a result of the actions of respondent herein described, petitioner has sustained irreparable damage in that petitioner and all members of his class have been deprived the opportunity to run for public office and for the opportunity to vote for the candidates of their choice solely because of petitioner's economic station and financial condition, and petitioner will continue to be irreparably harmed unless the respondent is compelled to perform his legal duties and required to process the nomination papers of petitioner.

SECOND CAUSE OF ACTION

XV

Petitioner repeats, realleges and incorporates by reference each and every allegation contained in Paragraphs I-XIV.

XVI

The refusal of respondent was void, unconstitutional and beyond the power or jurisdiction of the respondent, and a prejudicial abuse of discretion, in that the filing fees required by Section 6554 are totally unrelated to the rights and duties attributable to the candidates and are not germane to one's ability to participate intelligently in the electoral process.

XVII

There is no compelling state interest to justify the infringement on the rights of free speech and association for political action protected by the First and Fourteenth Amendment of the United States Constitution.

XVIII

If respondent is not compelled to perform his legal duties to process all necessary nomination papers of petitioner, petitioner both as a candidate and as a voter will irreparably be harmed.

XIX

WHEREFORE, petitioner prays that:

1. A Writ of Mandate issue under the seal of this Court commanding respondent JAMES S. ALLISON, his officers, agents and all other persons acting on his behalf to process all necessary nomination papers of the petitioner and any members of his class in regard to his candidacy to the Board of Supervisors of Los Angeles County without the payment of filing fees as a condition precedent thereto;

2. That the time for service of notice of hearing on this Writ be shortened so that hearing may be had on or before March 25, 1972;

3. Petitioner recovers costs of this action;

4. The Court grant such other and further relief as it may deem just and proper.

Dated: March 16, 1972.

MARGUERITE M. BUCKLEY

[Verification Omitted in Printing]

[Proof of Service Omitted in Printing]

[Title Page Omitted in Printing]

DECLARATION OF DONALD PAUL LUBIN

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I, DONALD PAUL LUBIN, say:

1. I am a citizen of the United States.

2. I am a duly registered voter in the County of Los Angeles, having continuously resided in the same Electoral Precinct since the last date upon which I registered to vote.

3. I filed a Declaration of Candidacy for the office of Board of Supervisors from the 4th District, and have circulated on my behalf sponsors' certificates for such office in order that I could qualify as a candidate for such office in the primary election to be held on June 6, 1972.

4. I secured official forms for Declaration of Candidacy and Sponsors' Certificates from the Registrar-Recorder of Voters in the County of Los Angeles pursuant to Court Order, but said official on March 10, 1972, refused to file such forms and certificates without the payment of fees.

5. I am unable to afford the $701.60 filing fee required to be paid by a candidate for the aforementioned office, under the provisions of Sections 6551, *et seq.*, of the California Elections Code.

6. My assets, other than clothing, personal effects, and miscellaneous household furniture and furnishings, consist of

> an old car, of the approximate value of $200; and an undivided one half (½) interest in a house in Boston, Massachusetts, which we have been unable to find a purchaser for—my equity may be $0. to $2500.

7. At the present time my debts are:

None.

8. My annual income during the year 1971 was the sum of $3,600; and my average monthly income during the year 1972 has been the sum of $ None.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Donald Paul Lubin
DONALD PAUL LUBIN

Executed on March 16, 1972, at Los Angeles, California.

[Title Page Omitted in Printing]

CALIFORNIA SUPREME COURT

No. ———

[Attorneys' Names and Title of Cause Omitted in Printing]

POINTS AND AUTHORITIES—Filed March 16, 1972

STATEMENT

Petitioner seeks to have the filing fee provisions of the California Elections Code invalidated on three basic grounds. First, he as a poor citizen of the State of California is effectively denied the right to run for office by the requirement of filing fees, for which California provides no alternatives. By taking this fundamental right from a chronically disadvantaged group, the State is denying him and members of his class equal protection of the laws under the Fourteenth Amendment. Second, he as a voter is denied the right to vote for persons who have the similar interests and experience and thus could be more truly representative of his situation. This violates his rights to free speech and association for obtaining political goals under the First Amendment as well as depriving him of equal protection under the Fourteenth Amendment. Third, basic constitutional rights cannot be infringed by the State unless there is a compelling state interest and there is no such compelling state interest in the California filing fee provisions. To the contrary, the State is using filing fees as a means of raising revenue solely and therefore the provisions are constitutionally invalid.

On February 17, 1972, petitioner with others filed a Petition for Writ of Mandate against the Secretary of State and the Los Angeles County Registrar-Recorder in the Los Angeles Superior Court, being case No. C-23138. The suit was filed in their behalf and that of all those similarly situated, being poor persons who wished to run for political office but were unable to pay the filing fees.

Judge John Cole signed an Alternative Writ of Mandate which was set for hearing on March 6, 1972—just four days prior to the filing deadline.

On March 6, 1972, Judge Robert A. Wenke sitting in Department 65 of the Los Angeles Superior Court denied the Petition for Writ of Mandate, interpreting *Bullock* vs. *Carter*, as merely prohibiting unreasonable fees. Judge Wenke stated that a welfare person who really was serious about running could find the money.

On March 9, 1972, a second Petition for Writ of Mandate was denied by the Court of Appeal, 2nd District.

On March 9, 1972, a Federal three-man Court sitting in San Francisco in the case of *Chote* v. *Brown* declared Congressional and State filing fees unconstitutional as to indigents.

Following that decision, Edmund G. Brown, Secretary of State, notified all county registrars that he would not be collecting filing fees from persons who were indigents.

Respondent has accepted filings from indigents in all State and Congressional races, but declined to file petitioner's nominating papers without further Court order because it was a local race. Unless such an order is obtained prior to March 28, 1972, he will be barred from participating in both the June primary and a run-off if one becomes necessary.

I

AFTER DENIAL OF A PETITION FOR WRIT OF MANDATE, PETITIONER MAY FILE A SECOND PETITION IN AN APPELLATE COURT.

A petitioner may file a second Petition for a Writ of Mandate in an Appellate Court after denial of relief by the Superior Court. To do so, he must show that the appellate remedy is inadequate. *Farley* v. *Healey* (1967) 67 C2d 325; *Caputo* v. *Municipal Court* (1960) 184 CA 2d 412.

In the instant case, relief was denied by both the Los Angeles Superior Court and the Court of Appeal, 2nd District, based on an erroneous interpretation of *Bullock*

v. *Carter*, —— U.S. —— (No. 70-128) decided February 24, 1972. Unless petition can obtain a hearing prior to March 28, 1972, he will be barred from participating in the elections of 1972.

An appeal from such decision, while it will not render the matter moot, would be meaningless in terms of relief for petitioner.

II

FILING FEE PROVISIONS OF THE CALIFORNIA ELECTIONS CODE DEPRIVE PETITIONER OF THE EQUAL PROTECTION OF THE LAWS UNDER THE FOURTEENTH AMENDMENT.

The right to run for public office has been affirmed in several cases recently. The right to seek public office is a fundamental right which the State cannot take from candidates solely because they cannot afford a filing fee. *Wong* v. *Mihaly*, 332 F.Supp. 165 (San Francisco 1971), *Jenness* v. *Little*, 306 F.Supp. 925 (N.D. Ga. 1969); *Fisher* v. *Taylor*, 196 S.W.2d 217 (S.Ct. Ark. 1946). See also *State* v. *Wilson*, 150 S.E.2d 592, 597 (S.Ct. of App. W.Va. 1966); *Kautenburger* v. *Jackson*, 333 P.2d 293, 294 (S.Ct. Ariz. 1958).

In *Thomas* v. *Mims*, 317 F.Supp. 179 (S.D. Ala. 1970), a United States District Court invalidated an Alabama statute requiring a registration fee of 2% of the annual salary for a municipal office under the equal protection clause of the Fourteenth Amendment. The Court affirmed the right to vote and to seek political offices as fundamental rights.

Once it is determined that the right to be a candidate is a fundamental right, any regulations which deny access to public office to a chronically disadvantaged group constitute discrimination and work as a denial of the equal protection of the laws. Filing fees which bear no reasonably relationship to the office being sought or the person's qualification therefor constitute a legislative guarantee that a "politically voiceless and invisible minority" remain in that disadvantaged condition. Denied access to seek public office, they are denied the ability to

use elections and the electoral process as a means of drawing the public's attention to their plight, to the causes which create poverty and the problems that accompany them. *Hobson* v. *Hansen*, 269 F.Supp. 401 (D. D.C. 1967), *aff'd as modified Sub.Nom. Smuck* v. *Hobson*, 408 F.2d 175 (D.C.Cir. 1969).

Bullock, et al. v. *Carter, et al.*, was decided by the U.S. Supreme Court on February 24, 1972.

The decision is somewhat ambiguous and should be read in the light of the decision of the Federal Court as set forth in 321 F.Supp. 1358 (N.D. Texas 1970).

It has been specifically applied to California in the case of *Chote* v. *Brown* (decided March 9, 1972). Judge Wollenberg sitting on a three-man Federal Court stated that California fees were not reasonable because they were related to the salary for the job and not the expenses of filing, and because they made no alternative provisions for indigents.

While Texas had election fees ranging as high as $8,900, it also had some lower than those in California. As the Court noted at page 2 in *Bullock* v. *Carter*— "payment of the filing fee is an absolute prerequisite to a candidate's participation in a primary election. There is no alternative procedure by which a potential candidate who is unable to pay the fee can get on the primary ballot by way of petitioning voters, and write-in votes are not permitted in primary elections for public office. Any person who is willing and able to pay the filing fee and who meets the basic eligibility requirements for holding the office sought can run in a primary."

The Lower Court invalidated the Texas filing fees and Judge Wm. M. Taylor, Jr. said at page 1362: "We have limited our decision here to say that a filing fee violates the First Amendment and the due process and equal protection clauses of the Fourteenth Amendment when it is used *as a revenue collecting device or when made an absolute qualification* in order for a candidate to get his name on the ballot." (Our emphasis.)

The U.S. Supreme Court chose to limit its decision to the equal protection clause of the Fourteenth Amendment. The decision emphasized that while the State may deter-

mine voter qualifications and the manner of elections, this power must be exercised in a manner consistent with the equal protection clause.

The Court at page 8 indicated that it had not theretofore attached the same fundamental status to candidacies as to voting. "However, the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters. Of course, not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review."

In the instant case, in denying the Petition for Writ of Mandate, Judge Wenke chose to interpret the decision as merely affirming the right of the State to charge reasonable fees, quoting from page 15. "It must be emphasized that nothing herein is intended to cast doubt on the validity of reasonable candidate filing fees or licensing fees in other contexts." He neglected to include the next sentence. "By requiring candidates to shoulder the costs of conducting primary elections through filing fees and *by providing no reasonable alternative means of access to the ballot*, the State of Texas has erected a system which *utilizes the criterion of ability to pay as a condition to being on the ballot*, thus excluding some candidates otherwise qualified and denying an undetermined number of voters the opportunity to vote for candidates of their choice." (Our emphasis.)

The California Elections Code provides no alternatives to paying the filing fees in order to qualify for election. Even before write-in votes will be counted, the filing fees must be paid under Elections Code Section 6555.

By focusing upon this factor of one's wealth, the Code results in blatant, invidious and harmful discrimination upon indigent, but otherwise qualified, persons who seek elective office. This violates the requirements of equal protection of the laws as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

In 1970, a Federal District Court in Georgia held that to require an indigent candidate to pay a qualifying fee with no other means of getting on the ballot was a viola-

tion of the equal protection. *Georgia Socialist Workers Party* v. *Fortson*, 315 Supp. 1035 (N.D. Ga. 1970).

Recently in San Francisco, in the case of *Wong* v. *Mihaly*, 332 F.Suppl. 165 (1971), municipal filing fees identical to those in question here (2% of the salary for the office) were ruled invalid as to poor people. Judge Wollenberg discussed the problem of the serious candidate: "The proposition that every serious candidate will be able to pay the fee required cannot be accepted without question. . . . There is, in fact, much to suggest that money and seriousness of candidacy are not always to be found in the same office seeker. On the other hand, it is clear beyond question here that the man who cannot pay, no matter how serious he is, cannot place his name in nomination."

The State and Federal Courts have been steadily broadening the equal protection clause of the Fourteenth Amendment to insure that poor people are not deprived of the benefits of this society solely because of their lack of wealth.

Persons cannot be discriminated against because of poverty. *Griffin* v. *Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956) (transcripts); *Boddie* v. *Connecticut*, 401 U.S. 388, 91 S.Ct. 780 (1971) (divorce); *Harper* v. *Virginia Board of Elections*, 383 U.S. 663, 86 S.Ct. 1079 (1966) (poll tax); *Tate* v. *Short*, 401 U.S. 395, 91 S.Ct. 668 (1970) (parking fines); *In Re Kraus*, 331 F.Supp. 1207 (1971) (bankruptcy); *McDonald* v. *Board of Election Commissioners of Chicago*, 394 U.S. 802 (1969).

In California, the Court has also recognized the principle that persons cannot be discriminated against solely because of the lack of wealth. *In Re Fry*, 19 C.A.3d 177.

In *Ferguson* v. *Keays*, 4 C.3d 649, 94 Cal. Rptr. 398, 484 P.2d 70 (1971), the Court approved in principle the waiver of the $50 fee for filing a record on appeal despite the argument (analogous to that advanced by respondents) that filing fees (appellate) defray the cost of Courts and discourage unnecessary litigation.

If the poor cannot be discriminated against in these areas, how can this Court sustain a similar argument for the equally important right to run for office?

The Supreme Court of California declared unconstitutional the denial of voting rights to non-property holders in the election of directors to a municipal district in *Burrey* v. *Embarcadero Municipal Improvement District*, —— Cal.3d ——, 97 Cal Rptr 203 (1971). The Court held that a legislative classification which discriminates on the basis of wealth constitutes a "suspect classification" and "can be sustained, if at all, only by the most compelling of state interest," at page 208.

This Court has also defined classification based upon wealth as a violation of the equal protection clause in *Serrano* v. *Priest*, 5 Cal.3d 584, 96 Cal Rptr 601 (1971), starting at p. 597:

> "In recent years, the United States Supreme Court has demonstrated a marked antipathy toward legislative classifications which discriminate on the basis of certain 'suspect' personal characteristics. One factor which has repeatedly come under close scrutiny of the high court is wealth. 'Lines drawn on the basis of wealth or property, like those of race (citation), are traditionally disfavored.' "

III

THE FILING FEE PROVISIONS OF THE CALIFORNIA ELECTIONS CODE VIOLATE THE FIRST AMENDMENT RIGHTS OF FREE SPEECH AND ASSOCIATION AS WELL AS THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

In the leading case of *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663, 86 S.CtC. 1079, 16 L.Ed. 2d 169 (1966), the Supreme Court in evaluating Virginia's poll tax concluded that a state violates the equal protection clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard. The Court said at page 668:

> ". . . The principle that denies the State the right to dilute a citizen's vote on account of his economic

status or other such factors by analogy bars a system which excludes those unable to pay a fee to vote or who fail to pay."

The right to vote is one of the most precious and important rights available to people in a democracy and as such is guaranteed by the First Amendment. *Harper* v. *Virginia State Board of Elections*, supra, p. 5.

As early as 1905, the Supreme Court of Nebraska struck down its election filing fees in the case of *State* v. *Drexel*, 105 N.W. 175 (1905) on the grounds that the filing fee operated as a substantial impairment of the right of the electorate to choose freely its candidates for public office.

IV

THE STATE OF CALIFORNIA AND THE COUNTY OF LOS ANGELES DO NOT HAVE SUCH COMPELLING INTERESTS AS TO INTERFERE WITH THE RIGHTS OF FREE SPEECH AND ASSOCIATION PROTECTED BY THE FIRST AND FOURTEENTH AMENDMENTS.

In California the Elections Code Section 6556 provides that the County Clerk must turn over to the County Treasurer all funds collected pursuant to Section 6554. Whereas the fees for State and Federal offices collected pursuant to Section 6552 are at least intended (under Section 6556) to support the "State Commission on Voting Machines and Vote Tabulating Devies to the extent that appropriations are made in the Budget Act from year to year," (although no such appropriations have even been made), the fees collected for County offices under Section 6554 have no specific intended use whatsoever and amount to a revenue-raising device.

Whenever a First Amendment right is being encumbered by the state, the burden is on the state to show that such infringement is necessary to support *a compelling* state interest. *Williams* v. *Rhodes*, 393 U.S. 30, 89 S.Ct. 10 (1969); *Kramer* v. *Union Free School District*, 393 U.S. 621, 89 S.Ct. 1886, 23 L.Ed. 2d 585 (1969).

In *Williams* v. *Rhodes*, the test devised included important elements: (1) the facts and circumstances behind the law, (2) the interest which the state *claims* to be protecting, and (3) the interests of those who are disadvantaged by the classification.

In the case of *McLaughlin* v. *Florida*, 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222 (1964), the Court indicated that the collection of revenue was a legitimate interest of the state. However to qualify as *a compelling* state interest, the law must be "necessary, and not merely rationally related to the accomplishment of a permissible state policy." In 1970 the Court in *Carter* v. *Dies*, 321 F.Supp. 1358 (N.D. Texas 1970) (decided in U.S. Supreme Court cited as *Bullock* v. *Carter*, supra, page 4) listed approximately 18 states that do not require candidates to pay any filing fees. These states include: Colorado, Indiana, Iowa, Illinois, Kansas, Kentucky, Maine, Massachusetts, Michigan, New Hampshire, New Jersey, New York, North Dakota, Oregon, Rhode Island, South Dakota, Tennessee and Vermont. If these states, including some of the largest in the country, do not find a compelling reason to use elections to collect revenue, it casts some doubt on California's use of this technique.

Filing fees as a means of raising revenue are notoriously deficient, weighing the small amount of revenue available to the state as opposed to the very heavy burdens placed upon the individuals who wish to exercise their constitutionally protected rights to vote and run for office.

In sum, it appears that the weight of authority has tipped to support the proposition that filing fees are an unconstitutional inhibition on the rights of indigent candidates and voters alike.

Respectfully submitted,

MARGUERITE M. BUCKLEY
Attorney for Petitioner

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

No. L.A. 29982

[Filed March 20, 1972]

[Title of Cause and Attorneys Names Omitted in Printing]

DEMURRER AND POINTS AND AUTHORITIES

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	21-22
Cases	21
Statutory Provisions	22
Texts	22
DEMURRER	23
POINTS AND AUTHORITIES	24
OPENING STATEMENT	24
I A STATE MAY REQUIRE A REASONABLE FILING FEE FROM ALL CANDIDATES IN A PRIMARY ELECTION BY REASON OF THE CLEAR LANGUAGE OF THE SUPREME COURT IN *BULLOCK* v. *CARTER*	24
II THIS COURT HAS TWICE HELD VALID THE REQUIREMENT OF THE FEES IMPOSED	27
A. *Socialist Party* v. *Uhl*	27
B. *Socialist Party* v. *Uhl has been Cite with Approval within the Last Two Years*	29
C. *This Court has Upheld the Present Filing Fees*	30
III MAJORITY OF CASES SUSTAIN THE IMPOSITION OF REASONABLE FEES	33
A. *The Fees in California have been Held to be Reasonable*	33
B. *Five Per Cent of the Annual Salary has been held to be a Reasonable Fee*	33
C. *Other Cases Uphold the Imposition of a Reasonable Fee*	34
IV THERE IS A COMPELLING STATE INTEREST THAT THERE BE A FILING FEE	35

TABLE OF AUTHORITIES

Cases:	Page
American River Flood Control District v. *Sweet*, 214 Cal. 778	32
Bodner v. *Gray* (Fla. 1961) 129 So.2d 419	34
Bullock v. *Carter*, 40 Law Week 4211	24, 26, 30
Carter v. *Dies*, 321 F.Supp. 1358	30
Carter v. *Wischkaemper*, 321 F.Supp. 1358	24
Chote v. *Brown* (U.S.D.C.N.D. Calif.) No. 72380	34
Cross v. *Bruning*, 413 F.2d 678	32, 33
Cross v. *Bruning*, S.F. 21655	27, 30, 33
Diffendorfer v. *Porter Homer*, unreported, No. 68-455, D.C.S.D. Fla.	34
Fowler v. *Adams*, 315 F.Supp. 592	29, 34
Haag v. *The State of California*, (U.S.D.C.C.D. Calif. 1970) No. 70-426-R	33
Johnson v. *Grand Forks County*, 16 S.Dak. 363, 113 N.W. 1071	30
Kenneweg v. *Allegheny County Com'rs.*, 102 Md. 119, 62 A. 249	34
McLean v. *Durham County Board of Elections*, 222 N.C. 6, 21 S.E.2d 842	35
Merced Falls Gas and Electric Company v. *Turner*, 2 Cal. App. 720	35
Montgomery v. *Chelf*, 118 Ky. 766, 82 S.W. 389	29, 34
People v. *Bradley*, 1 Cal.3d 80	34
People v. *Election Commissioners*, 221 Ill. 9, 77 N.E. 321	30
People v. *Stout*, 18 Cal.App.3d 172	34
People v. *United National Life Ins. Co.*, 66 Cal.2d 577	31
People v. *Western Air Lines*, 42 Cal.2d 621	31
Pope v. *Haimowitz*, 404 U.S. 806, 30 L.Ed.2d 37	33
Riggle, State ex rel. v. *Brodigan*, 37 Nev. 492, 143 P. 238	30, 35
Saks & Co. v. *City of Beverly Hills*, 107 Cal.App.2d 260	32
Simmons v. *Inyo Cerro Gordo Mining and Power Co.*, 48 Cal.App. 524	32
Socialist Party v. *Uhl*, 155 Cal. 776	27, 29, 30, 35
Spillers v. *Slaughter*, 325 F.Supp. 550	33, 34
State ex rel. Riggle v. *Brodigan*, 37 Nev. 492, 143 P. 238	30, 35
State v. *Drexel*, 74 Neb. 776, 105 N.W. 174	27, 30
State ex rel. Zent v. *Nichols*, 50 Wash. 508, 97 P. 728	35
State ex rel. Thompson v. *Scott*, 99 Minn. 148, 108 N.W. 828	29, 34
Thompson, State ex rel. v. *Scott*, 99 Minn. 148, 108 N.W. 828	29, 34
Wetherington v. *Adams*, 309 F.Supp. 318	34

Statutory Provisions:	Page
Constitution of the United States, 1st & 14th Amdts	25
28 U.S.C. § 1257(2)	32, 33
Constitution of California, former Art. IV, sec. 23	28
Elections Code,	
Section 6403	32
Section 6552	30, 31
Section 6554	30
Section 6555	36
Government Code,	
Section 8901	28
Sections 11552.5 and 12000	27-28
Former Political Code, §§ 384, 397, 417, 455, 513, 4231	27-28
Statutes of 1909,	
Ch. 239 p. 366	27
Ch. 271 p. 414	27
Ch. 366 p. 604	28
Ch. 374 p. 610	28
Ch. 405 p. 691 (Primary Election Act of March 24, 1909)	27
Ch. 450 p. 782	28
Ch. 451 p. 782	28
Ch. 453 p. 783	27
Statutes of 1953,	
Res. Ch. 5, p. 3781	28
Charter, County of Los Angeles, Art. II, Sec. 4	28
Texts:	
Annotation 89 A.L.R.2d 864	34, 35

[Title of Court, Cause and Document Omitted in Printing]

DEMURRER AND POINTS AND AUTHORITIES—

Filed March 20, 1972

Comes now, the Respondent, in the above entitled action and demurs to the Petition for Writ of Mandate on the following grounds:

I

The petition does not state facts sufficient to constitute a cause of action.

II

The petition is uncertain in that it is impossible to tell from Paragraph XI of the First Cause of Action, or in any other allegation in the petition whether petitioner tendered to respondent a nomination paper or not and, if he did so, how he could do so when he alleged in Paragraph VI of his First Cause of Action that the respondent wrongfully failed and refused and continues to fail and refuse to issue to petitioner the necessary nomination paper for candidacy for Board of Supervisor of the County of Los Angeles.

WHEREFORE, respondent prays that the petition be dismissed.

JOHN D. MAHARG
County Counsel

EDWARD H. GAYLORD
Division Chief

and

JOE BEN HUDGENS
Deputy County Counsel

By /s/ Edward H. Gaylord
EDWARD H. GAYLORD
Attorneys for Respondent

EHG/ec
3/17/72

POINTS AND AUTHORITIES

OPENING STATEMENT

Petitioner who earned no money this calendar year, whose supporters (if any) are not sufficiently enthusiastic to contribute towards the small filing fee required, contends that he is a serious candidate for supervisor for the most populous county in this country, where he will represent a supervisorial district of substantially more than a million persons, and that the reasonable filing fee imposed is unconstitutional despite the fact that this Court has twice rejected this contention.

I

A STATE MAY REQUIRE A REASONABLE FILING FEE FROM ALL CANDIDATES IN A PRIMARY ELECTION BY REASON OF THE CLEAR LANGUAGE OF THE SUPREME COURT IN *BULLOCK* v. *CARTER*

The Supreme Court in *Bullock* v. *Carter*, 40 Law Week 4211, affirmed the judgment of the three-judge federal trial court in *Carter* v. *Wischkaemper*, 321 F. Supp. 1358 (N.D. Tex. 1970). At issue was the Texas system of laws which required of appellees filing fees of $1,000-6,300 to be paid to the county executive committee of the political party conducting the primary. In effect, the entire burden of financing primary elections was placed on the candidates rather than on a government unit.

The court reasoned that barriers to candidate access to the primary ballot do not as such compel close scrutiny. 40 Law Week at 4214.

But the court then noted:

> "Unlike a filing fee requirement which most candidates could be expected to fulfill from their own resources or at least through modest contributions, the very size of the fees imposed under the Texas system gives it a patently exclusionary character. * * *"

The court then appears to conclude that because the excessively high fees have such an impact upon the economic status of candidates, and their backers, the Texas laws must be " 'closely scrutinized' and found reasonably necessary to the accomplishment of legitimate state objectives in order to pass constitutional muster." 40 Law Week at 4214, right hand column. While recognizing that the State has a legitimate interest to avoid the clogging of its election machinery, to avoid voter confusion, to avoid overcrowded ballots, and to protect the integrity of its political processes from frivolous or fraudulent candidacies, the court concluded that the large fees required by Texas were not reasonably necessary to protect those valid interests. The court then recognized a legitimate State objective in requiring filing fees to relieve the State Treasury of a portion of the cost of conducting the primary elections, but the court held that there was no *necessity* that the candidate pay his apportioned share of the entire primary. The court concluded:

> "* * * It must be emphasized that nothing herein is intended to cast doubt on the validity of reasonable candidate filing fees or licensing fees in other contexts. * * *" 40 Law Week at 4216, left hand column.

The court apparently rejected the reasoning of the majority opinion of the trial court that the Texas filing fee system violated the First Amendment and the due process clause of the Fourteenth Amendment. (*See*: 321 F.Supp. at 1362.) Also, the Supreme Court opinion never mentions the "compelling state interest" requirement relied upon by petitioner herein and by some of the lower federal courts, upon whose decisions petitioner relies. It appears that the Supreme Court adopted at least in part the reasoning of the concurring opinion of Justice Thornberry in the court below that the State interest could justify only reasonable fees designed to compel contribution by a candidate to a reasonable portion of the primary expenses attributable to his candidacy. (*See*: 321 F.Supp. pp. 1363-65.)

At page 7 of his Points and Authorities petitioner says:

> "In the instant case, in denying the Petition for Writ of Mandate, Judge Wenke chose to interpret the decision as merely affirming the right of the State to charge reasonable fees, quoting from page 15. 'It must be emphasized that nothing herein is intended to cast doubt on the validity of reasonable candidate filing fees or licensing fees in other contexts.' He neglected to include the next sentence. 'By requiring candidates to shoulder the costs of conducting primary elections through filing fees and *by providing no reasonable alternative means of access to the ballot*, the State of Texas has erected a system which *utilizes the criterion of ability to pay as a condition to being on the ballot*, thus excluding some candidates otherwise qualified and denying an undetermined number of voters the opportunity to vote for candidates of their choice.' (Our emphasis.)"

In the second sentence the court was discussing not reasonable fees but the unreasonable Texas fees. The court cites the analogy of license fees when it refers to:

> "* * * or licensing fees in other contexts."

We are unaware of any statute or ordinance providing a method of obtaining a license without the payment of the required fee or of any decision holding such an alternative to be necessary.

The Supreme Court certainly did not hold, as petitioner appears to contend here, that any candidate filing fee is presumed invalid as applied to candidates who do not have personal assets sufficient to pay the fee.

California requires only reasonable fees of candidates and such fees defray only a small portion of the total election expense. As we read *Bullock* v. *Carter*, we have no doubt that the United States Supreme Court would uphold the reasonable California filing fees challenged herein.

II

THIS COURT HAS TWICE HELD VALID THE REQUIREMENT OF THE FEES IMPOSED.

A. Socialist Party v. *Uhl.*

At the top of page 11 of his Points and Authorities the petitioner cites and relies upon *State* v. *Drexel*, 74 Neb. 776, 105 N.W. 174. The decision in that case has twice been rejected by this Court. *Cross* v. *Bruning*, S.F. 21655 (unreported) (Appeal dismissed, 379 U.S. 202, 85 S.Ct. 340, 13 L.Ed.2d 339); *Socialist Party* v. *Uhl* (1909) 155 Cal. 776 at bottom of page 790, 103 P. 181. The latter case was a:

> "* * * proceeding to test the validity of the Primary Election Act of March 24, 1909."

At page 789 the court said:

> "The act provides for the payment of certain fees by candidates on filing with the proper officer their nomination papers and affidavits of candidacy. These fees apply to all nominees—state, district, county, and municipal—and range from fifty dollars to be paid by a candidate for state office to ten dollars to be paid by county, legislative, or municipal officers, where the selection of candidates for municipal office is held under the primary law."

These fees are provided for by Section 7 of the act, Stats. 1909, chapter 405, page 691 at page 696. Considering the purchasing power of the dollar in 1909 these fees are no lower than those presently required. For example, in 1909 the salary of the Governor was ten thousand dollars per year. Political Code § 384 as am. Stats. 1909, ch. 271 p. 414. (now $49,000, Gov. Code § 12000); lieutenant governor, four thousand dollars, Pol. C. § 397 as am. Stats. 1909, ch. 453 p. 783 at p. 784. (now $35,000, Gov. C. § 11552.5); Secretary of State, Controller, Treasurer, and Superintendent of Public Instruction, five thousand dollars per year, Political Code Sections 417 (am. Stats. 1909, ch. 239, p. 366) 438 (am. Stats. 1909,

ch. 451, p. 782), 455 (am. Stats. 1909, ch. 450 p. 782) 513 (am. Stats. 1909 ch. 366 p. 604) respectively. Each of these officers now receive seven times that amount, $35,000, Gov. Code § 11552.5. Supervisors of the County of Los Angeles received annual salaries of $2400.00 per year. Pol. C. § 4231, paragraph 14, am. Stats. 1909, ch. 374 p. 610 at bottom of page 617. Their salary now is the same as a judge of the Superior Court of this County. Article II, Section 4 of the Charter of the County of Los Angeles as amended by Stats. 1953, res. ch. 5 p. 3781 at p. 3783. In 1909 State Senators and Assemblymen received one thousand dollars for each regular session (only one every two years) plus ten dollars per day during special sessions. State Constitution Art. IV, Sec. 23, as am. Nov. 3, 1908. They now receive $19,200 per year. Gov. C. § 8901.

At pages 789 and 790 the court said:

> "It is provided in the act that these fees are to be paid into the county or municipal treasury when they are paid by county or municipal candidates, and when paid by candidates for state or district nominations are to be apportioned and paid by the state treasurer to the county treasurer of the counties in which such candidates are to be voted for. The validity of this provision requiring the payment of fees is sustainable under the constitutional amendment, as being within the power of the legislature to provide reasonable conditions for the exercise of the rights granted by the primary law. As said by one court to which this question was presented: 'The right to exact a reasonable fee for the privilege for running for office may be sustained, on the principle that fees in actions and proceedings in courts, and for filing and recording papers, are sustainable; namely, that those who seek the benefit of a particular proceeding provided by law may be compelled to reimburse the state for a portion of the costs the state incurs in maintaining the instrumentality to carry into effect the particular proceeding. In other words the state asks the candidate for office under a particular law to reimburse it for a

part of the expenses it incurs in carrying that law into effect. This clearly the state may lawfully do.' (*State* v. *Nichols*, 50 Wash. 508, [97 Pac. 728, 730].)

"Aside from this, such a provision is a reasonable restriction and provides an orderly and systematic method by which the people may select their candidates for public office. The exaction of a fee tends to prevent an indiscriminate scramble for office. Where it is fixed at an amount that will impose no hardship upon any person for whom there should be any desire to vote as a nominee for any office, and yet enough to prevent the wholesale filing of petitions for nominations of any one regardless of whether or not he is a desirable candidate. It is but a reasonable means adopted by the legislature to regulate primary elections for the selection of candidates for public office. And the constitutional provision that no property qualification shall be required of any person to vote or hold office is not violated by such provision as to the payment of a fee, but is a reasonable regulation prescribed by the legislature on the wise assumption that any candidate who is of sufficient worth to stand before the people as a candidate for public office and whose candidacy calls for the payment of the fee required by the act will be at no difficulty to pay the required amount. (*State* v. *Scott*, 99 Minn. 145, [108 N.W. 829]; see, also, *Montgomery* v. *Schlef*, 118 Ky. 766, [82 S.W. 389].)"

B. Socialist Party v. *Uhl has been Cited with Approval within the Last Two Years.*

Although what we have quoted was quoted in our Points and Authorities in the Superior Court, the petitioner ignores the case. If pressed to comment he might attempt to distinguish *Socialist Party* v. *Uhl*, *supra* on the ground that it was decided many years ago but it has been cited with approval within the last two years. It was cited in *Fowler* v. *Adams* (D.C.M.D. Fla. 1970) 315 F.Supp. 592 at 594 as authority to sustain the statement that the majority view sustained the imposi-

tion of reasonable fees, in that case five per cent of one year's salary.

In *Bullock* v. *Carter, supra,* the United States Supreme Court held the fees imposed by Texas unreasonably large and therefore void but said that a reasonable fee could be imposed. That was the conclusion of Circuit Judge Thornberry in the court below, *sub nominee Carter* v. *Dies* (U.S.D.C.N.D. Texas Dec. 21, 1970) 321 F.Supp. 1358 at 1364 where he said that reasonable fees could be imposed citing, in Footnote 6 *Socialist Party* v. *Uhl, supra* and *State ex rel. Riggle* v. *Brodigan* (1914) 37 Nev. 492, 143 P. 238 at 239, which latter case also cited and followed *Socialist Party* v. *Uhl, supra.*

Socialist Party v. *Uhl, supra* has never been reversed or overruled.

C. This Court has Upheld the Present Filing Fees.

Present Sections 6552 and 6554 of the Elections Code have been held constitutional also, by the Supreme Court of this State. On March 18, 1964 Nancy Cross and Ariel Sloan filed an original proceeding in the Supreme Court of this State, *Cross* v. *Bruning,* S.F. 21655 attacking, in sub-paragraph 2 of Paragraph III on page 7 of their petition numerous sections of the present Elections Code including Sections 6552 and 6554. On page 16 of their Points and Authorities the petitioners said:

> "This Court has expressed its will that those most immediately in jeopardy by relation to misfortune may not be taxed for governmental operations inuring to the general in the circumstances. Some parallel may be observed in prescription of the exaction of fees bearing no relation to the cost of nomination papers as a condition of simply taking out nomination papers. * * *"

Then then cited *People* v. *Election Commissioners,* 221 Ill. 9 at 21, 77 N.E. 321; *State* v. *Drexel,* 74 Neb. 776, 105 N.W. 174, 179; *Johnson* v. *Grand Forks County,* 16 S.Dak. 363, 113 N.W. 1071, all of which invalidated certain election filing fees and all of which were cited by *Socialist Party* v. *Uhl, supra* (1909) 155 Cal. 776 at

bottom of page 790, and distinguished or disapproved. This Court without opinion denied the petition on March 25, 1964.

Nancy Cross then appealed to the Supreme Court of the United States which dismissed her appeal on December 7, 1964. 379 U.S. 202, 85 S.Ct. 340, 13 L.Ed.2d 339.

On October 4, 1967, she filed a complaint against Bruning in the United States District Court, Northern District of California, again challenging the constitutionality of Section 6552 and other sections of the Elections Code. The District Court dismissed the action on November 24, 1967, for lack of jurisdiction and for failure to state a claim upon which relief can be granted. An appeal was filed with the Ninth Circuit Court of Appeals. At page 2 of her opening brief she stated she sought a judicial decree enjoining the enforcement of California Elections Code Sections * * *.

She then listed nineteen sections including Section 6552. At pages 3 and 4 she said:

> "b. As a condition of obtaining nomination papers of actual value about 25¢ (thus distinguished from filing them after collection of signatures, or from receiving a certificate of election or nomination after an election), require payment of a percentage of the salary from the United States Treasury to a Representative to Congress. The amount is 1% of $30,000, or $300. The payment is nonrefundable. * * * The $300 fee for nomination papers . . . highly discriminates against persons of present economic status * * *."

In quoting from the briefs in these cases we have followed the example of a number of reported cases which have examined the briefs in cases cited to determine what has been decided.

People v. *United National Life Ins. Co.* (1967) 66 Cal.2d 577 at 594, 58 Cal.Rptr. 599 at 610;

People v. *Western Air Lines* (1954) 42 Cal.2d 621 at 647 (Appeal dismissed, 348 U.S. 859, 75 S.Ct. 87, 99 L.Ed. 677);

American River Flood Control District v. *Sweet* (1932) 214 Cal. 778 at 782, 783;
Saks & Co. v. *City of Beverly Hills* (1951) 107 Cal. App.2d 260 at 267, 237 P.2d 261;
Simmons v. *Inyo Cerro Gordo Mining and Power Co.* (1920) 48 Cal. App. 524 at 532.

In 1969 the Court of Appeals held that it was bound by the dismissal of the appeal in the state case of *Cross* v. *Bruning, supra*, 379 U.S. 202, 85 S.Ct. 340, 13 L.Ed. 2d 339, and affirmed the judgment, saying, 413 F.2d 678 at 679:

> "* * * On March 18, 1964, the plaintiff Cross * * * filed a petition in the Supreme Court of California, pursuant to California Elections Code § 6403. In that petition Cross asserted that numerous sections of the California statutes governing elections were unconstitutional and prayed that the Supreme Court of California declare them unconstitutional, as in violation of the Constitution of the United States. The Supreme Court of California, after a hearing, but without opinion, denied Cross' petition on March 25, 1964, and denied a rehearing on April 25, 1964. Cross, on July 27, 1964 filed in the Supreme Court of California her notice of appeal to the Supreme Court of the United States, pursuant to Section 1257(2) of Title 28 U.S. Code. In her 'Statement as to Jurisdiction' in her appeal to the Supreme Court Cross cited seventeen sections of the California Elections Code as being the most significant of the statutes, the constitutionality of which she attacks. She then cited six additional sections of California statutes, as being relevant, as well as thirteen sections of the Constitution of California. The Supreme Court of the United States, in Cross v. Bruning, 379 U.S. 202, 85 S.Ct. 340, 13 L.Ed.2d 339, on December 7, 1964, dismissed her appeal for want of jurisdiction.
>
> " * * Since the Supreme Court of California dismissed the plaintiff's petition, thereby deciding in favor of the California statutes which were attacked in the plaintiff's petition, she was entitled, under

Title 28 of the United States Code, Section 1257 (2), to get to the Supreme Court of the United States by appeal, if her appeal presented a substantial federal question. * * * Since the Supreme Court had the case under its obligatory jurisdiction; i.e., by appeal, its dismissal of the case for want of jurisdiction was a dismissal on the merits, for failure to present in the jurisdictional statement, a substantial federal question."

The United States Supreme Court denied certiorari, 396 U.S. 970, 90 S.Ct. 455, 24 L.Ed.2d 437, and denied a rehearing, 396 U.S. 1063, 90 S.Ct. 760, 24 L.Ed.2d 757.

III

MAJORITY OF CASES SUSTAIN THE IMPOSITION OF REASONABLE FEES.

A. *The Fees in California have been Held to be Reasonable.*

Cross v. *Bruning, supra* (1964) S.F. 21655 (appeal dismissed 379 U.S. 202, 85 S.Ct. 340, 13 L.Ed.2d 339) as interpreted by *Cross* v. *Bruning, supra* (C.C.A. 9, Cal. 1969) 413 F.2d 678 (certiorari denied, 396 U.S. 970, 90 S.Ct. 455, 24 L.Ed.2d 437, rehearing denied, 396 U.S. 1063, 90 S.Ct. 760, 24 L.Ed.2d 757), necessarily held that the fees now imposed by the Elections Code were reasonable. So did *Haag* v. *The State of California* (U.S.D.C. C.D. Calif. 1970) No. 70-426-R (unreported).

B. *Five Per Cent of the Annual Salary has been held to be a Reasonable Fee.*

Requirements in the State of Florida that a candidate pay a fee of five per cent of the annual salary have been held to be reasonable in a number of cases.

Spillers -. *Slaughter* (U.S.D.C.M.D. Fla. 1971) 325 F.Supp. 550 in which at page 553 the court held that there was a compelling state interest requiring the fee. (Under the title *Pope* v. *Haimowitz* (U.S. 1971) 404 U.S. 806,

30 L.Ed.2d 37 the United States Supreme Court vacated the judgment and remanded the case to the District Court with directions to dismiss as moot.)

Wetherington v. *Adams* (D.C.N.D. Fla. 1970) 309 F.Supp. 318;

Fowler v. *Adams* (D.S.M.D. Fla. 1970) 315 F.Supp. 592 at 594;

Diffenderfer v. *Porter Homer* (D.C.S.D. Fla. No. 68-455, Cic.E.C.), unreported but cited by *Spillers* v. *Slaughter, supra;*

Bodner v. *Gray* (Fla. 1961) 129 So.2d 419 at 420, 89 A.L.R.2d 860 at 863 (and note annotation at page 864.)

C. *Other Cases Uphold the Imposition of a Reasonable Fee.*

At page 3 petitioner cites *Chote* v. *Brown* (U.S.D.C.N.D. Calif. March 9, 1972, No. 72380) and subsequently other federal cases holding *any* filing fee unconstitutional. Of course, this Court is:

"* * * not bound by the decisions of the lower federal courts even on federal questions. * * *"

People v. *Bradley* (1969) 1 Cal.3d 80 at 86, 81 Cal. Rptr. 457, 460 P.2d 129.

To the same effect is *People* v. *Stout* (1971) 18 Cal.App. 3d 172 at 175, 95 Cal.Rptr. 593.

In *Chote* v. *Brown, supra,* the dissenting opinion of the judge of the Court of Appeal is far more persuasive than the opinion concurred in by the two district judges. Conceding that federal cases may be persuasive we already have cited at pages 13, 19, and 20, *supra* federal cases upholding the imposition of reasonable fees. In addition thereto, note:

Montgomery v. *Chelf* (Ky. 1904) 82 S.W. 388 at 390;

Kenneweg v. *Allegheny County Com'rs.* (1905) 102 Md. 119, 62 A. 249;

State ex rel. Thompson v. *Scott* (1906) 99 Minn. 148, 108 N.W. 828 at 829;

State ex rel. Riggle v. *Brodigan* (1914) 37 Nev. 492, 143 P. 238 at 239 (citing and relying upon *Socialist Party* v. *Uhl, supra*);

McLean v. *Durham County Board of Elections* (1942) 222 N.C. 6, 21 S.E.2d 842 at 845 (also citing and relying upon *Socialist Party* v. *Uhl, supra*);

State ex rel. Zent v. *Nichols* (1908) 50 Wash. 508, 97 P. 728 at 730.

We already have the annotation in 89 A.L.R.2d 864.

IV

THERE IS A COMPELLING STATE INTEREST THAT THERE BE A FILING FEE.

We have been shown a letter from a high school principal in which he says that, as a class project, all of his students who are eligible to do so, are going to run for public office. As said in *Merced Falls Gas and Electric Company* v. *Turner* (1906) 2 Cal. App. 720 at 725:

> "* * * This statement cannot be considered as a fact in the case, but it serves to illustrate the consequences which would inevitably follow the application of the doctrine for which appellant [petitioner] contends. * * *"

If it be held either that no candidate need pay a filing fee or that a candidate who submits an affidavit of poverty, the truth of which the Registrar-Recorder has no way of checking, may file without the payment of any fee we can anticipate a large number of filings "just for a lark" where the candidates are not serious and will conduct no campaigns. Incidentally what are petitioner's campaign plans?

At the bottom of page 7 of his Points and Authorities petitioner begins:

> "By focusing upon this factor of one's wealth * * *."

This is just not so. The Elections Code excludes a person not because he is poor but because he has not paid

the fee. A poor person who obtains the fee from others, such as from persons who intend to support his candidacy, is not excluded from the ballot.

At page 7 of his Points and Authorities petitioner says:

> "The California Elections Code provides no alternatives to paying the filing fees in order to qualify for election. Even before write-in votes will be counted, the filing fees must be paid under Elections Code Section 6555."

This is not so. Section 6555 reads:

> "6555. When a person for whom a declaration of candidacy has not been filed is nominated for an office by having his name written on the ballot, he shall pay the same filing fee that would have been required if his declaration had been filed. If he does not pay that fee his name shall not be printed on the ballot at the ensuing general election."

It is clear that the write-in votes *are* counted before the filing fee is required. If a candidate receives sufficient votes to be nominated for a nonpartisan office, either a plurality or more votes than any candidate except the candidate with a plurality, by reason of such success there should be no difficulty in obtaining from supporters the filing fee.

At page 5, in referring to persons without any money, petitioner says:

> "* * * Denied access to seek public office, they are denied the ability to use elections and the electoral process as a means of drawing the public's attention to their plight, to the causes which create poverty and the problems that accompany them."

Considering the immense amount of legislation both in Congress and in this State on welfare and in other ways attempting to alleviate the plight of the poor it is clear that they have been represented adequately. How far would petitioner press this argument? Must the mediocre, the stupid, even the mentally retarded be represented by their peers? Must five year olds be represented? In

making these observations, we do not concede, of course, that a poor person is necessarily unable to obtain the filing fee.

EHG/ec
3/17/72

[Proof of Service Omitted in Printing]

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA
IN BANK

L.A. No. 29982

[Filed Mar. 22, 1972, G. E. Bishel, Clerk,
————————, S. F. Deputy]

LUBIN, Individually, etc.,

v.

ALLISON, as Registrar-Recorder, etc.

ORDER DENYING ALTERNATIVE WRIT

Petition for writ of mandamus denied.

/s/ Wright
Chief Justice

SUPREME COURT OF THE UNITED STATES

No. 71-6852

DONALD PAUL LUBIN, ETC., PETITIONER

v.

JAMES S. ALLISON, Registrar-Recorder, County of Los Angeles

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for a writ of certiorari be, and the same is hereby, granted. In addition to the questions presented in the petition the parties should address themselves to the question of whether it is the candidate's indigency or the indigency of his supporting group that is the relevant issue in this case.

May 7, 1973

* U. S. GOVERNMENT PRINTING OFFICE: 1973 506060 694

Supreme Court, U.S.
FILED
JUL 10 19
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972

No. 71-6852

DONALD PAUL LUBIN, individually and on behalf of all others similarly situated,
Petitioner,

vs.

JAMES S. ALLISON, Registrar-Recorder of the County of Los Angeles,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

JOHN D. MAHARG,
County Counsel, County of Los Angeles, State of California
EDWARD H. GAYLORD,
Division Chief
648 Hall of Administration
500 West Temple Street
Los Angeles, California 90012
Telephone: (213) 625-3611, Ext. 65645
Attorneys for Respondent.

WESTERN PRINTING COMPANY, WHITTIER—OXBOW 9-1782

IN THE

Supreme Court of the United States

October Term, 1972

No. 71-6852

DONALD PAUL LUBIN, individually and on behalf of all others similarly situated,

Petitioner,

vs.

JAMES S. ALLISON, Registrar-Recorder of the County of Los Angeles,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

James S. Allison, Registrar-Recorder of the County of Los Angeles, respondent, on the merits will seek to sustain the decision of the Supreme Court of California in this case but, nevertheless, urges that the writ of certiorari be granted so that this case may be considered in conjuction with the appeal in ***Edmund G. Brown, Jr. v. Raymond G. Chote,*** docketed in this Court on June 5, 1972, as No. 71-1583, which is an appeal from the so-far unreported case of ***Chote v. Brown*** (March 9, 1972) No. 72380, a three-judge dis-

trict court in the Northen District of California, relied upon by the peititioner at pages 5 and 7 of his petition in the case at bench, and the appeal in *Norvell v. Apodaca,* filed in this Court May 18, 1972, Docket No. 71-1511, an appeal from the decision of the Supreme Court of New Mexico in *State ex rel. Apodaca v. Fiorina et al.,* (N.M. April 18, 1972) 495 P.2d 1379.

The questions of law in all three cases are substantially identical, the validity of the requirement of a filing fee by a candidate to have his name placed on the ballot.

The case at bench attacks the provisions of Section 6554 of the Elections Code of the State of California insofar as it requires a filing fee of a candidate for supervisor of the County of Los Angeles.

Brown v. Chote, supra involves the validity of Section 6552 of the same Elections Code which specifies the filing fee to be paid by candidates for United State Senator, Representative in Congress, or for any state office.

Norvell v. Apodaca, supra involves the validity of New Mexico statute, §3-8-26, subd. A, N.M.S.A., 1953 (Rpl. Vol. 1, 1970) imposing a filing fee of six per cent of the first year's salary to place the name of a candidate on the ballot. (The Supreme Court of New Mexico upheld the requirement.)

It is respectfully submitted that there is no material distinction between the questions of law in the three

cases (except that the percentage is much higher in New Mexico than in California) and that it would be most appropriate that they be considered together.

JOHN D. MAHARG,
County Counsel of the County of Los Angeles, State of California, and

EDWARD H. GAYLORD,
Division Chief
Attorneys for Respondent.

LIBRARY
SUPREME COURT, U. S.

Supreme Court
FILED
JUL 10
MICHAEL RODAK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-6852

DONALD PAUL LUBIN, individually and on behalf of all others similarly situated,

Petitioner,

v.

LEONARD PANISH, Registrar-Recorder of the County of Los Angeles,

Respondent.

BRIEF FOR PETITIONER

MARGUERITE M. BUCKLEY
226 San Juan Avenue
Venice, California 90291

A. L. WIRIN and FRED OKRAND
ACLU Foundation of Southern California
323 West Fifth Street
Los Angeles, California 90013

Attorneys for Petitioner

John D. O'Loughlin
Jill Jakes
Of Counsel

Washington, D.C. • CLB PUBLISHERS, INC. • (202) 393-0625

TABLE OF CONTENTS

	Page
OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
QUESTIONS PRESENTED	4
STATEMENT OF FACTS	6
SUMMARY OF ARGUMENT	8
ARGUMENT:	
I. California's Filing Fee Requirement Denies Poor Persons the Right To Seek Public Office Solely Because of Their Economic Station, and Deprives Poor People of Equal Protection of the Laws as Guaranteed by the Fourteenth Amendment	9
A. The right to participate in the electoral process is a fundamental right	9
B. Fundamental rights cannot be denied to poor persons solely because of their economic station	10
C. The "rational basis" test is not applicable here	15
II. The Rights of an Indigent Candidate Cannot Be Separated From the Rights of the Indigent Community Which He Purports To Represent	20
A. Assuming arguendo, the relevant issue is the indigency of the supporters of the candidate; nevertheless, the filing fee is invalid	20
B. Assuming arguendo, the relevant issue is the indigency of the individual candidate; then perforce the California filing fee requirement must fall	23

III. California's Filing Fee Requirement Denies Poor Persons the Right To Vote for Candidates of Their Choice, Solely Because of Their Economic Station, Depriving Them of the Right of Free Expression and Association for the Advancement of Political Beliefs Guaranteed by the First and Fourteenth Amendments of the United States Constitution, as Well as Equal Protection of the Laws 26

CONCLUSION 29

TABLE OF AUTHORITIES

Cases:

Adkins v. duPont de Nemours & Co., 335 U.S. 331 (1948) 21

Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963) 28

Boddie v. Connecticut, 401 U.S. 388, 91 S.Ct. 780 (1971) 14, 16

Brown v. Chote, ___ U.S.___, 41 L.W. 4548 (1973) (No. 71-1583, October Term 1972) 8

Bullock v. Carter, 405 U.S. 134 (1972) ..... *passim*

Burrey v. Embarcadero Municipal Improvement District, 5 C.3d 671, 97 Cal. Rptr. 203 (1971) 9,14,15

Camara v. Mellon, 4 C.3d 714 (1971) 10

Cantwell v. Connecticut, 310 U.S. 296 (1940) 28

Carroll v. Princess Anne, 393 U.S. 175 (1968) 28

Carter v. Wischkaemper, 321 F. Supp. 1358 (10 N.D. Tex. 1970) 26

Chicago Police Dep't v. Mosley, 408 U.S. 92 (1972) 16

Chote v. Brown, 342 F.Supp. 1353 (N.D. Cal. 1972) See Brown v. Chote 7, 18

Cipriano v. City of Houma, 395 U.S. 701 (1969) 9

Dunn v. Blumstein, 405 U.S. 330 (1972) 16

Ferguson v. Keays, 4 C.3d 649, 94 Cal. Rptr. 398, 484 P.2d 70 (1970) 14

Fisher v. Taylor, 196 S.W.2d 217 (S.Ct. Ark. 1946) 10

In re Fry, 19 C.A.3d 177 (1971) 14

Georgia Socialist Workers Party v. Fortson, 315 F. Supp. 1035 (N.D. Ga. 1970) 10

Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956) 14, 16

Hanover v. Northrup, 325 F. Supp. 170 (D.C. Conn. 1970) 27

Harper v. Vance, 342 F. Supp. 136 (Ala. 1972) 11

Harper v. Virginia Board of Elections, 383 U.S. 663, 86 S.Ct. 1079 (1966) ..... *passim*

Hobson v. Hansen, 269 F. Supp. 401 (D.C. 1967), *aff'd as modified sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969) 11

Jackson v. Olgilvie, 325 F.Supp. 864 (1971) 26

Jenness v. Little, 306 F.Supp. 925 (N.D. Ga. 1969) 10, 11

Kautenburger v. Jackson, 333 P.2d 293 (S.Ct. Ariz. 1958) 10

Kelso v. Cook, 110 N.E. 987 (S.Ct. Ind. 1916) 27

Kramer v. Union Free School District, 395 U.S. 621 (1969) 9

Levy v. Louisiana, 391 U.S. 68 (1968) 15

Mancuso v. Taft, 476 F.2d 187 (C.A. 1, 1973) 24

McDonald v. Board of Election Commissioners of Chicago, 394 U.S. 802 (1969) 16

McGowan v. Maryland, 366 U.S. 420 (1961) 15

McLaughlin v. Florida, 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222 (1964) 28

Morey v. Doud, 354 U.S. 457 (1957) 15

N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958) 28

New York Times Co. v. United States, 403 U.S. 713 (1971) 28

Organization for A Better Austin v. Keefe, 399 U.S. 904, 90 S.Ct. 2196, 29 L.Ed.2d 1 (1970) 28

Reynolds v. Sims, 377 U.S. 533 (1964) 9, 16, 24

Rinaldi v. Yeager, 384 U.S. 305 (1966) 16

Salyer Land Co. v. Tulare Lake Basin Water Storage District, ___ U.S. ___ 41 L.W. 4390 (1973) 15

Serrano v. Priest, 5 C.3d 584, 96 Cal. Rptr. 601 (1971) 14

Shapiro v. Thompson, 394 U.S. 613 (1969) 16

Skinner v. Oklahoma, 316 U.S. 535 (1942) 16

Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969) 11

State v. Drexel, 105 N.W. 175 (Neb. 1905) 11, 28

State v. Wilson, 150 S.E.2d 592 (S.Ct. of App. W.Va. 1966) 10

Sweezy v. State of New Hampshire, 354 U.S. 234 (1957) 27, 28

Tate v. Short, 401 U.S. 395, 91 S.Ct. 668 (1970) 14

Thomas v. Mims, 317 F. Supp. 179 (S.D. Ala. 1970) 9, 11

Turner v. Fouche, 396 U.S. 346 (1969) 8, 10, 23

United States v. Kraus, ___ U.S. ___, 41 L.W. 4117 (1973) 16

United States v. Texas, 252 F. Supp. 234, 384 U.S. 155 (1966) 19, 21

Weber v. Aetna Casualty & Surety Co., 406 U.S. 1964 (1972) 16

Williams v. Rhodes, 393 U.S. 30, 89 S.Ct. 10 (1969) ... *passim*

Wong v. Mihaly, 332 F. Supp. 165 (San Francisco 1971) 9, 11

Yick Wo v. Hopkins, 118 U.S. 356 (1885) 9

Zeilenga v. Nelson, 4 C.3d 716 (1971) 10, 26

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-6852

DONALD PAUL LUBIN, individually and on behalf of all others similarly situated,

Petitioner,

v.

LEONARD PANISH, Registrar-Recorder of the County of Los Angeles,

Respondent.

BRIEF FOR PETITIONER

OPINION BELOW

The Supreme Court of the State of California rendered no opinion in connection with its order, filed on March 22, 1972, denying petitioner's petition for writ of mandate. A copy of its order of denial is set out in the Single Appendix filed herein (p. 38).

JURISDICTION

Petitions for writs of mandate were filed in the Los Angeles Superior Court, California Court of Appeal, 2nd

District, and the Supreme Court of the State of California. Each of said Courts denied said petitions on March 6, 1972, March 9, 1972, and March 22, 1972, respectively.

The constitutional issues were raised consistently in each instance. This Petition for Certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this Court is invoked under Title 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; *or the right of the people peaceably to assemble,* and to petition the Government for a redress of grievances." (our emphasis)

The Fourteenth Amendment to the Constitution of the United States, provides in pertinent part as follows:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the *equal protection of the laws.*" (our emphasis)

California Elections Code §§6551, 6552, 6554, 6555, 18602 and 18603 provide in pertinent part as follows:

"6551. All forms required for nomination and election to all congressional, state and county offices shall be furnished only by the country clerk. At the time of issuance of those forms the county clerk shall type in the forms the name of the candidate and the office for which he is a candidate, shall imprint a stamp which reads 'Official Filing Form,' and shall affix his signature. The forms shall be distributed without charge to all candidates applying for them, upon the *prepayment of the filing fees* provided for in Section 6552, 6553 and 6554. The filing fees shall not be refunded in the event the candidate fails to qualify as a candidate. (our emphasis)

"6552. The following fees for filing declarations of candidacy shall be paid to the Secretary of State by each candidate:

"(a) Two percent of the first year salary for the office of United States Senator or for any state office. The fee prescribed in this subdivision does not apply to the office of State Senator or Assemblyman or to an office to be voted for in a district comprising more than one county.

* * * * *

"6554. A filing fee of ten dollars ($10) shall be paid to the county clerk for filing a declaration of candidacy for an office to be voted for wholly within one county with the following exceptions:

* * * * *

"(e) The filing fee to be paid to the county clerk by each candidate for a county office, other than a judicial office and the office of district attorney, shall be the same percentage of the annual salary of

the office as that provided for in subdivision (a) of Section 6552 of this code. This subdivision shall not apply to any candidate for any office for which the annual salary is two thousand five hundred dollars ($2,500) or less. (Amended by Statutes 1969, Chap. 1160.)

"6555. When a person for whom a declaration of candidacy has not been filed is nominated for an office by having his name written on the ballot, he shall pay the same filing fee that would have been required if his declaration had been filed. If he does not pay that fee his name shall not be printed on the ballot at the ensuing general election.

* * * * *

"18602. The declaration required by Section 18601 shall be filed no later than the eighth day prior to the election to which it applies. It shall be filed with the clerks, registrar of voters, or district secretary responsible for the conduct of the election in which the candidate desires to have write-in votes of his name counted. (Amended by Statutes 1970, Chap. 559.)

"18603. No name written upon a ballot in any state, county, city, city and county, or district election shall be counted for an office or nomination unless

* * * * *

"(b) The fee required by Section 6555 is paid when the declaration of write-in candidacy is filed pursuant to Section 18602."

QUESTIONS PRESENTED

Petitioner Donald Paul Lubin filed a class petition for writ of mandate directed to James S. Allison, Registrar-Recorder of the County of Los Angeles in the Supreme

Court of the State of California.[1] Petitioner asked that the Registrar be required to process nomination papers of petitioner and any members of his class in regard to his candidacy to the Board of Supervisors of Los Angeles County without the payment of filing fees as a condition precedent.

The questions thereby arising are:

1. Whether the refusal of the Registrar to permit petitioner and other members of his class to file nomination papers solely because of his inability to pay filing fees in the sum of $701.60 was unconstitutional and beyond the power or jurisdiction of respondent in that the filing fee requirement denies poor people the right to seek public office solely because of their economic station, and deprives poor persons of equal protections of the laws as guaranteed by the Fourteenth Amendment of the United States Constitution.

2. Whether the refusal of the Registrar to permit petitioner and other members of his class to file nomination papers solely because of his inability to pay the filing fees in the sum of $701.60 denies petitioner and members of his class the opportunity to vote for candidates of their choice, depriving him and them of the right of free expression and association for the advancement of political beliefs guaranteed by the First and Fourteenth Amendments of the United States Constitution, as well as equal protections of the laws.

3. Whether the State of California is infringing on basic constitutional rights by providing no alternative to the filing fee requirement.

---

[1]Mr. Allison subsequently retired and has been succeeded by the present respondent, Leonard Panish.

4. Whether it is the candidate's indigency or the indigency of his supporting group which is the relevant issue in this case.[2]

STATEMENT OF FACTS

The facts relevant to the questions presented by this petition are uncontroverted and therefore may be introduced to the Court in a summary manner.

Petitioner Donald Paul Lubin is and at all times mentioned in this petition was a citizen, voter, and candidate for nomination to election to the Board of Supervisors for Los Angeles County who cannot afford the filing fee required for said office, Single Appendix (p. 2).

On or about February 15, 1972, petitioner appeared at the office of James S. Allison, Registrar-Recorder of the County of Los Angeles, to apply for and secure all necessary nomination papers requisite for his candidacy for the Board of Supervisors for Los Angeles County, Single Appendix (pp. 3, 4).

Petitioner demanded that said nomination papers be provided him by said Registrar, but petitioner was refused the issuance of said nomination papers orally and in writing solely because petitioner was unable to pay certain filing fees required by §§6551 and 6554 of the California Elections Code. Said fees are $701.60 for a candidate for Board of Supervisors of Los Angeles County, Single Appendix (p. 4).

On February 17, 1972, petitioner with others filed a petition for writ of mandate against the Secretary of

---

[2]The Court on the granting of certiorari requested discussion of this question in addition to those presented in the petition for writ of certiorari.

State and the Los Angeles County Registrar-Recorder in the Los Angeles Superior Court, being case No. C-23138. The suit was filed in their behalf and that of all those similarly situated, being poor persons who wished to run for political office but were unable to pay the filing fees, Single Appendix (p. 5).

Judge John Cole signed an alternative writ of mandate which was set for hearing on March 6, 1972–just four days prior to the filing deadline, Single Appendix (p. 5).

On March 6, 1972, Judge Robert A. Wenke sitting in Department 65 of the Los Angeles Superior Court denied the petition for writ of mandate, Single Appendix (p. 5).

On March 9, 1972, a second petition for writ of mandate was denied by the Court of Appeal, 2d District, Single Appendix (p. 5).

On March 9, 1972, a Federal three-judge Court sitting in San Francisco in the case of *Chote v. Brown*, 342 F. Supp. 1353 (N.D. Cal. 1972) issued a temporary injunction to petitioner Chote enjoining county and state officials from requiring payment of filing fees by indigent candidates for congressional and state offices, Single Appendix (p. 5).

Following that decision, Edmund G. Brown, Secretary of State, notified all county registrars that he would not be collecting filing fees from persons who were indigents, while the case was appealed to this Court, Single Appendix (p. 5).

Respondent Registrar herein accepted filings from indigents in all state and congressional races, but declined to file petitioner's nominating papers without further Court order because it was a local race, Single Appendix (p. 6).

On March 22, 1972, the Supreme Court of the State of California denied a petition for writ of mandate in this case, Single Appendix (p. 38).

On the day this Court granted certiorari herein, it decided *Brown v. Chote*, ____U.S. ___, 41 L.W. 4548 (1973), affirming its judgment and returned the case to the District Court for further proceedings.

SUMMARY OF ARGUMENT

1. California's system of election filing fees violates the Equal Protection of the Laws as guaranteed by the Fourteenth Amendment. The system requires payment of fees of one and two percent of the yearly salary, without alternatives for candidates unable to pay such fees. A similar system in Texas was struck down by this Court in *Bullock v. Carter*, 405 U.S. 134 (1972).

2. The test to be applied to the system of election filing fees is the "compelling interest" test. The rights to vote and to be a candidate are both integral parts of the political process, and are fundamental rights.

3. The rights of the candidate as an individual and a member of a class and as a voter or supporter of a candidate are inseparably linked. Both are relevant to the instant case. Both are entitled to benefit of the Equal Protection of the Laws clause of the Fourteenth Amendment. Under the doctrine of *Turner v. Fouche*, 396 U.S. 346 (1969), once the privilege to run for political office was established, California could not make wealth a condition of running or discriminate against candidates who lacked wealth. California's failure to establish alternatives to paying the filing fee violates the Equal Protection Clause.

4. Both the right to vote and the right to run for office are necessary concomitants of rights protected by the First Amendment, namely, speech, publication and assembly. These rights are made applicable to the states under the Fourteenth Amendment.

5. An election filing fee is in essence a prior restraint on First Amendment rights and therefore should be declared invalid.

ARGUMENT

I.

CALIFORNIA'S FILING FEE REQUIREMENT DENIES POOR PERSONS THE RIGHT TO SEEK PUBLIC OFFICE SOLELY BECAUSE OF THEIR ECONOMIC STATION, AND DEPRIVES POOR PEOPLE OF EQUAL PROTECTION OF THE LAWS AS GUARANTEED BY THE FOURTEENTH AMENDMENT.

A. The right to participate in the electoral process is a fundamental right.

The right to vote is one of the most precious and important rights available to people in a democracy, and as such is guaranteed by the United States Constitution. *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966). The Courts have consistently found that the right to vote is included within the category of rights deemed fundamental and necessary. In *Yick Wo v. Hopkins*, 118 U.S. 356 (1885), the Court found it to be a "fundamental political right, because" it is "preservative of all rights." *Kramer v. Union Free School District*, 395 U.S. 621 (1969); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Cipriano v. City of Houma*, 395 U.S. 701 (1969); *Burrey v. Embarcadero Municipal Improvement District*, 5 C.3d 671, 97 Cal. Rptr. 203 (1971).

An important corollary is the right to seek public office. Without meaningful choices of candidates, the right to vote becomes a mere formality. Numerous courts have recognized that this is a fundamental right. *Wong v. Mihaly*, 332 F.Supp. 165 (N.D. Calif. 1971); *Thomas v.*

Mims, 317 F. Supp. 179 (S.D. Ala. 1970); *Jenness v. Little*, 306 F.Supp. 925 (N.D. Ga. 1969); *Fisher v. Taylor*, 196 S.W.2d 217 (S.Ct. Ark. 1946); *Zeilenga v. Nelson*, 4 C.3d 716 (1971); *Camara v. Mellon*, 4 C.3d 714 (1971); *Georgia Socialist Workers Party v. Fortson*, 315 F. Supp. 1035 (N.D. Ga. 1970). See also *State v. Wilson*, 150 S.E.2d 592 (S.Ct. of App. W.Va. 1966); *Kautenburger v. Jackson*, 333 P.2d 293 (S.Ct. Ariz. 1958); *Williams v. Rhodes*, 393 U.S. 30 (1969).

In *Bullock v. Carter, supra*, this Court indicated that it had not theretofore attached the same fundamental status to candidacies as to voting. But, at page 143, the Court said:

> "However, the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters."

B. Fundamental rights cannot be denied to poor persons solely because of their economic station.

Once it is determined that the right to be a candidate is a fundamental right, any regulations which deny access to public office to a chronically disadvantaged group constitute discrimination and work as a denial of the equal protection of the laws. *Turner v. Fouche*, 396 U.S. 346 (1969). Filing fees which bear no reasonable relationship to the office being sought or the person's qualification therefor constitute a legislative guarantee that a politically voiceless and invisible minority remain in that disadvantaged condition. But even if such filing fees bore a resemblance to reasonableness, if there are no provisions for that group which cannot afford even such "reasonable" fees, there is a denial of equal protection.

Bullock v. Carter, supra. Denied access to seek public office, they are deprived of the ability to use elections and electoral processes as a means of drawing the public's attention to their plight, to the causes which create poverty and the problems that accompany them, and thereby perhaps to solutions. *Hobson v. Hansen*, 269 F. Supp. 401 (D.C. 1967), *aff'd as modified sub nom. Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969).

It should be axiomatic that the State cannot prevent candidates from running for office solely because they cannot afford a filing fee. And some cases have so held. *Harper v. Vance*, 342 F. Supp. 136 (Ala. 1972); *Bullock v. Carter, supra; Wong v. Mihaly, supra; Jenness v. Little, supra; Thomas v. Mims, supra; State v. Drexel*, 105 N.W. 175 (Neb. 1905).

In *Thomas v. Mims, supra*, a United States District Court invalidated an Alabama statute requiring a registration fee of two percent of the annual salary for a municipal office, similar to that involved in the instant case. The Court affirmed the right to vote and to seek political office as fundamental rights entitled to the protection of the Equal Protection Clause of the Fourteenth Amendment.

A Federal Court in California affirmed the right to file for political office without the payment of fees. In *Wong v. Mihaly*, 332 F. Supp. 165, *supra*, municipal filing fees identical to those in question here were ruled invalid as to poor people. Judge Wollenberg discussed the problem of serious candidates: "The proposition that every serious candidate will be able to pay the fee required cannot be accepted without question. . . . There is, in fact, much to suggest that money and seriousness of candidacy are not always to be found in the same office seeker. On the other hand, it is clear beyond question here that the man

who cannot pay, no matter how serious he is, cannot place his name in nomination."

Bullock v. Carter, supra, involved a Texas system of election fees which were in some instances much higher than California's, but which were also in instances much lower. The one major feature which both systems have in common is that neither State provides alternatives to paying the filing fees in order to qualify for election. As this Court noted in *Bullock, supra,* at page 137, "payment of the filing fee is an absolute prerequisite to a candidate's participation in a primary election. There is no alternative procedure by which a potential candidate who is unable to pay the fee can get on the primary ballot by way of petitioning voters, and write-in votes are not permitted in primary elections for public office. Any person who is willing and able to pay the filing fee and who meets the basic eligibility requirements for holding the office sought can run in a primary" (footnotes omitted).

The Court at page 149 also said: "It must be emphasized that nothing herein is intended to cast doubt on the validity of reasonable candidate filing fees or licensing fees in other contexts. By requiring candidates to shoulder the costs of conducting primary elections through filing fees *and* by providing no reasonable alternative means of access to the ballot, the State of Texas has erected a system which utilizes the criterion of ability to pay as a condition to being on the ballot, thus excluding some candidates otherwise qualified and denying an undetermined number of voters the opportunity to vote for candidates of their choice" (emphasis added).

In California, filing fees for all political offices (federal, state and local) are fixed by statute. Generally, they are

fixed at a percentage of the first year's salary for the office sought. The fee for candidates for United States Senator, Governor and other state offices and some county offices, is two percent of the annual salary. Candidates for Representative to Congress, State Senator or Assemblyman, or for judicial office or district attorney, must pay one percent. No filing fee is required of candidates in the presidential primary, or for offices which pay either no fixed salary or not more than $600 annually (California Elections Code §§6551, 6552 and 6554, *supra*). There are no alternatives to the payment of filing fees. In the State of California, if there were no candidates who could afford the filing fees, there would be no elections because even write-in votes cannot be counted without the pre-payment of the filing fees (California Elections Code §18603(b)).

Under the California statutes in effect at the most recent election for office, the required candidate filing fees ranged from $192 for State Assembly, $425 for Congress, $701.60 for Los Angeles County Board of Supervisors, $850 for United States Senator, to $982 for Governor.

The situation described in *Bullock v. Carter, supra,* thus matches that of California.

By focusing upon the factor of one's wealth, the California Code results in blatant, invidious and harmful discrimination upon indigent but otherwise qualified persons who seek elective office. This violates the requirements of equal protection of the laws as guaranteed by the Fourteenth Amendment of the Constitution of the United States. While the State may determine voter qualifications and the manner of elections, it must do so in a manner consistent with the Equal Protection Clause.

Persons cannot be discriminated against because of poverty. *Griffin v. Illinois*, 351 U.S. 12 (1956) (transcripts); *Boddie v. Connecticut*, 401 U.S. 388 (1971) (divorce); *Harper v. Virginia Board of Elections, supra* (poll tax); *Tate v. Short*, 401 U.S. 395 (1970) (parking fines).

In California, the Courts have been cognizant of the principle that persons cannot be discriminated against solely because of the lack of wealth. *In re Fry*, 19 C.A.3d 177 (1971). They have been zealous in protecting the rights of the poor.

In *Ferguson v. Keays*, 4 C.3d 649, 94 Cal. Rptr. 398, 484 P.2d 70 (1970), the California Supreme Court approved in principle the waiver of the $50 fee for filing a record on appeal despite the argument that filing fees defray the cost of courts and discourage unnecessary litigation.

The California Supreme Court has also defined classification based upon wealth as a violation of the Equal Protection Clause in *Serrano v. Priest*, 5 C.3d 584, 96 Cal. Rptr. 601 (1971). At page 597, the Court said: "In recent years, the United States Supreme Court has demonstrated a marked antipathy toward legislative classifications which discriminate on the basis of certain 'suspect' personal characteristics. One factor which has repeatedly come under close scrutiny of the high court is wealth. 'Lines drawn on the basis of wealth or property, like those of race . . ., are traditionally disfavored.' "

In *Burrey v. Embarcadero Municipal Improvement District, supra*, the California Supreme Court declared unconstitutional the denial of voting rights to non-property holders in the election of directors to a municipal district. The Court held at page 679 that a legislative classification which discriminates on the basis

of wealth "can be sustained, if at all, only by the most compelling of state interests."

Burrey, supra, is not inconsistent with the Court's decision in *Salyer Land Co. v. Tulare Lake Basin Water Storage District* (1973), ____ U.S. ____, 41 L.W. 4390. *Burrey* involved a "district with virtually all the powers of a city" (p. 674) and, of course, the instant case involves a governmental body in its pristine form, the Board of Supervisors of the most populous county in the state.

At a time when California and Federal Courts have been steadily broadening the Equal Protection Clause of the Fourteenth Amendment to insure that poor people are not deprived of the benefits of this society, solely because of their lack of wealth, the State of California and County of Los Angeles have refused to extend that protection to one of the most fundamental and important rights available to people in a democracy.

C. The "rational basis" test is not applicable here.

This Court has developed two standards to measure constitutionality within the framework of equal protection of the laws. Under the general standard, sometimes called the "rational basis" test, the Court examines different treatment to see whether the difference has any rational relationship to a legitimate public policy. *Levy v. Louisiana,* 391 U.S. 68 (1968); *McGowan v. Maryland,* 366 U.S. 420 (1961); *Morey v. Doud,* 354 U.S. 457 (1957). On the other hand, in cases involving "suspect classifications" touching upon "fundamental interests and rights," the Court has invoked a much stricter standard. In such cases, the classificaton is considered invidious, and government officials are required to justify

such differences by a "compelling" interest. *Harper v. Virginia Board of Elections, supra; Shapiro v. Thompson,* 394 U.S. 613 (1969); *McDonald v. Board of Election Commissioners of Chicago,* 394 U.S. 802, 807 (1969); *Levy v. Louisiana, supra; Rinaldi v. Yeager,* 384 U.S. 305 (1966); *Reynolds v. Sims, supra; Skinner v. Oklahoma,* 316 U.S. 535 (1942); *Dunn v. Blumstein,* 405 U.S. 330, 335 (1972); *Weber v. Aetna Casualty & Surety Co.,* 406 U.S. 164, 172-73 (1972); *Chicago Police Dep't v. Mosley,* 408 U.S. 92, 95 (1972). Cf. *Boddie v. Connecticut, supra; Griffin v. Illinois, supra.*

Williams v. Rhodes, supra, enunciates the elements to be weighed to determine whether there is such a compelling interest. The test weighs the facts and circumstances behind the law, the interest which the State claims to be protecting, and the interests of those who are disadvantaged by the classification.

This case, like *Bullock v. Carter, supra,* reflects the two elements which the Court has considered crucial in judging the validity of state statutes under the Equal Protection Clause of the Fourteenth Amendment: the legislative classification (1) is "highly suspect" (i.e., based on indigency or poverty), and (2) impinges upon "fundamental constitutional rights" (i.e., voting and political association).

This Court's decision in *United States v. Kraus,* ___ U.S. ___, 41 L.W. 4117 (1973), should not be considered as a retreat from its previous decisions protecting rights of indigents. All that the case held was that the right to discharge in bankruptcy was not a fundamental right akin to free speech and that since there were alternatives available to the bankrupt, the rational justification test sufficed because "bankruptcy legislation is in the area of economics and social welfare." (41 L.W. at 4121). This cannot be said of the issue at bar. The right to vote and

its concomitant right to be a candidate for office can be considered as no other than fundamental, akin, indeed, to free speech.

In light of the major political crises of the country today, political rights afforded to the citizens of the United States must be strengthened, not weakened.

In the instant case, the California Legislature set forth its intentions in collecting fees for nominations in Elections Code §6556 "that the funds deposited in the General Fund pursuant to this section will be used to support the State Commission on Voting Machines and Vote Tabulating Devices to the extent that appropriations are made in the Budget Act from year to year." However, no appropriations have ever been made, and it is obvious that the fees are a mere revenue raising device, Single Appendix (p. 18).

Opposed to the stated purpose are the fundamental rights which are being disadvantaged—namely, the right to vote and the right to be a candidate. Both rights have been established heretofore as vital. California sets up a de facto classification of excluding poor persons solely because of their poverty. The payment of a fee is an absolute condition and therefore the failure to meet it is a disqualification from holding public office.

Thus, the California system has the same infirmities of the Texas system struck down in *Bullock v. Carter, supra.* While the range of fees is not so great, and the fees for some offices not so large, the fees required by the California statutes are more than nominal or minimal, and they produce a similar "disparity in voting power based on wealth." (p. 144) Most importantly, they include *no* alternative to the payment of fees to obtain a place on the ballot. *Bullock v. Carter,* 405 U.S. 134, 149, *supra.*

The costs of campaigning for elective public office are notoriously high, and indeed prohibitive for many prospective candidates otherwise qualified and having substantial popular support. For a poor candidate and his supporters proposing to finance a campaign on a low budget, the requirement of a $701.60 filing fee may make the difference between a candidacy which is viable and one which has no chance at all.

In the June 1972 primary elections in Los Angeles County, H. Steve Luce, a candidate for the Democratic nomination for U.S. Congress, 24th District, who had been allowed to file as an indigent candidate under the temporary injunction issued in *Chote v. Brown, supra,* received, 17,054 votes (34.0% of the total). According to Mr. Luce's sworn statement of receipts and expenditures on file with the Los Angeles County Registrar of Voters, only $178.32 was spent on his campaign—less than half the amount of the $425 filing fee. Absent the *Chote v. Brown, supra,* temporary injunction, the Los Angeles County Registrar-Recorder would have refused to issue Mr. Luce forms on which to secure nomination signatures, refused to print his name on the ballot, and even refused to count write-in votes cast in his behalf.

The impact of the filing fee on exercise of the franchise is thus real, appreciable, and directly related to the resources of the voters supporting a particular candidate. *Bullock v. Carter, supra,* requires that the State make a "showing of necessity" for any impingement. But none is shown.

In *Bullock, supra,* the Court indicated at page 148:

"... It seems appropriate that a primary system designed to give the voters some influence at the nominating stage should spread the cost among all of the voters in an attempt to distribute the influence without regard to wealth. Viewing the

> myriad governmental functions supported from general revenues, it is difficult to single out any of a higher order than the conduct of elections at all levels to bring forth those persons desired by their fellow citizens to govern. . . ."

Filing fees as a means of raising revenue are notoriously deficient, weighing the small amount of revenue available to the State as opposed to the very heavy burdens placed upon the individuals who wish to exercise their constitutionally protected rights to vote and run for office.

In *United States v. Texas*, 252 F. Supp. 234, 254, 384 U.S. 155 (1966), the Court discussing the poll tax imposed by the State of Texas said:

> ". . . It is clear, however, that the Legislature and the people may not choose to deny a fundamental constitutional right as a means of collecting revenue. . . . If the State of Texas placed a tax on the right to speak at the rate of one dollar and seventy-five cents per year, no court would hesitate to strike it down as a blatant infringement of the freedom of speech. Yet the poll tax as enforced in Texas is a tax on the equally important right to vote."

At least 22 states, including Arizona, Colorado, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Massachusetts, Michigan, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Vermont and Wisconsin have no primary filing fees. If these states, including some of the largest in the country, do not find it even "necessary" to use elections to collect revenue, it can hardly be argued that California is "compelled" to use this method.

II.

THE RIGHTS OF AN INDIGENT CANDIDATE CANNOT BE SEPARATED FROM THE RIGHTS OF THE INDIGENT COMMUNITY WHICH HE PURPORTS TO REPRESENT.

The Court has requested discussion of whether it is the candidate's indigency or the indigency of his supporting group which is relevant to the instant case.

As this Court noted in *Bullock v. Carter, supra,* at page 143, "The initial and direct impact of filing fees is felt by aspirants for office, rather than voters, ... However, the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters."

Realistically, the rights of the candidates and the rights of their constituents, the voters, are integral parts of the political process. A group of voters cannot hope to be successful in attaining representation in government unless they have a candidate for political office. A candidate must have a constituency, must have voters who wish to organize around and vote for him or her.

A. Assuming arguendo, the relevant issue is the indigency of the supporters of the candidate; nevertheless, the filing fee is invalid.

If a candidate cannot pay the filing fee in California, he cannot even be issued nomination papers on which to gather the signatures of his supporters. Although he may have the support of a large number of poor voters, he cannot appear on the ballot unless they are able to raise the amount of the filing fees for him. Obviously, any fees fall more heavily on the poor community.

More affluent persons easily obtain a place on the ballot as well as contributions. The Los Angeles County Registrar-Recorder says: "We do not concede, of course, that a poor person is necessarily unable to obtain the filing fee." (Single Appendix, p. 37) This attitude ignores the realities of life for approximately 25% of the people. It also ignores the spirit of *Adkins v. duPont de Nemours & Co.*, 335 U.S. 331 (1948), in which the Court ruled that a person need not be totally destitute to file in Forma Pauperis. Surely, the same should be true with respect to the rights connected with voting.

Assume that the candidate could collect $1.00 from each of 702 persons in his community to meet the filing fee requirement for Board of Supervisors in Los Angeles County. But then to the extent that these 702 voters have been *required* to contribute funds in order to have their vote recorded for the candidate of their choice, they have been required to pay an indirect poll tax. Such a tax has been proscribed in *United States v. Texas*, 252 F. Supp. 234, 384 U.S. 155, *supra*, and in *Harper v. Virginia Board of Elections*, 383 U.S. 663, *supra*. The main evil of a poll tax was that it made it impossible for the class of citizens more effected to remove the very restriction that disenfranchised them.

This Court explicitly recognized the inequities inherent in this situation in *Bullock v. Carter*, 405 U.S. 134, 144, *supra*:

> "... Not only are voters substantially limited in their choice of candidates, but there is the obvious likelihood of this limitation falling more heavily on the less affluent segment of the community, whose favorites may be unable to pay the large costs required by the Texas system. To the extent that the system requires candidates to rely on contributions from voters in order to pay the assessments, a

> phenomenon which can hardly be rare in light of the size of the fees, it tends to deny some voters the opportunity to vote for a candidate of their choosing; . . . [W]e would ignore reality were we not to recognize that this system falls with unequal weight on voters, as well as candidates, according to their economic status."

Poor people are affected directly by filing fees which substantially limit the choices which are available to them as voters. Candidates who would be most sympathetic to the needs of poor persons would probably come from the poverty community and might have difficulty paying the filing fee. Their inability to do so would eliminate them as choices for poor voters resulting in a deprivation of the opportunity for meaningful representation.

The poverty community is further damaged by the filing fee system of the State of California. All persons in California pay sales taxes of 5% which support in part the electoral process. Unable to pay fees, poor people cannot participate as candidates in the very elections which their taxes have helped finance.

If the indigency of the community is *the* criterion, a system would have to be devised to determine the economic status of the candidate's supporters before he could be permitted to file without payment of the filing fee. A rich man whose constituency could be proved to be poor would be permitted to file without payment of fees. His personal status would not affect rights derived from the community he represents. Other questions would arise, such as, if several candidates claimed to represent the same poverty community, would all be entitled to file without payment of the filing fees? What portion of the constituency would be necessary to indicate support from a poverty community, 5%, 15%, 51%? What percentage of the poverty community would

constitute a portion of the constituency? In the end, the election itself would probably be the best method of determining who the candidates' supporters actually were.

If poor people cannot run candidates from within their own community for lack of resources, then the right to vote and the constitutional guarantees of representation are meaningless. Thus, the right to be a candidate is more than a corollary of the right to vote. It is in fact an integral part of that right.

B. Assuming arguendo, the relevant issue is the indigency of the individual candidate; then perforce the California filing fee requirement must fall.

This Court to date has not attached the same importance to the right of an individual to be a candidate as to the right to vote. *Bullock v. Carter, supra,* p. 143. In *Turner v. Fouche,* 396 U.S. 346, 362, 363, the Court held that once the privilege of holding public office is given, the State may not deny it to some on the basis of distinctions that violate federal constitutional guarantees.

The right to be a candidate is a corollary of the right to vote and an integral part of the political process.

The United States Constitution provides in Articles I and II that legislative and executive power shall reside in elected representatives and an elected president, respectively. Article IV, Section 4 provides "the United States shall guarantee to every State in this Union a Republican Form of Government."

Webster's *Third New International Dictionary,* Unabridged (1968, p. 1928), defines Republic as "a government in which supreme power resides in a body of citizens entitled to vote and is exercised by elected

officers and representatives responsible to them and governing according to law."

"Representative" is defined as "of, based upon, or constituting a form of government in which the many are represented by persons chosen from among them usually by election."

Inherent within the system of government guaranteed by the United States Constitution are two elements: voters and representatives chosen from said voters.

The right to vote entails more than just the right to cast a ballot. It means the right to vote effectively. *Reynolds v. Sims*, 377 U.S. 533, *supra; Williams v. Rhodes*, 393 U.S. 30, *supra*. To vote effectively means the right to have a real choice of representatives, even to be a candidate yourself. See *Mancuso v. Taft*, 476 F.2d 187, 190 (C.A. 1, 1973).

Although a person's vote is important to him individually, its chief importance lies in its potential for combining with others. It is a part of a political force with the potential power to determine the legislative policies governing his life. *Harper v. Virginia Board of Elections, supra*. If the voter cannot be a candidate or has no choice of a candidate because neither can pay the filing fee, there is no power in the vote.

There is very low voter participation in American elections, consistently the lowest in fact of all democratic countries.[3] Less than 55% of the potentially eligible voters cast ballots in the last presidential election, even though 18 year-olds had been newly enfranchised. The turnout was not considered unusual. For most elections, local as well as national, apathy is especially high among the poor. As an editorial in the *New York Times* on

---

[3]*New York Times* editorial, p. 38, December 4, 1972.

December 4, 1972, at page 38, noted: "There is a direct correlation between income and political participation. The poor do not vote in large numbers."

The November 1972 elections in Los Angeles County provide a direct example of this point. According to figures compiled by the Los Angeles County Registrar of Voters and published by the California Secretary of State in his *Report of Registration* booklets for October 1972 and January 1973, the percentage of registered voters dropped from the registration rolls for failure to vote in that general election was 30.3% in the low income 53rd Assembly District of South Central Los Angeles as compared to only 14.3% in the relatively high income 54th Assembly District, including such high income communities as San Marino.

The right to be a candidate has become increasingly important in our society as various groups have begun to demand their rights to full participation in the political mainstream. Women, Blacks, Chicanos, Asian-Americans, Indians, welfare recipients—all are organizing, no longer satisfied with nearly exclusive representation by white middle-class males. Regardless of the sincerity with which these representatives utter statements of concern for the welfare and interests of minority groups, they frequently have little understanding of the conditions, needs and desires of the communities they purport to represent.

The rights of candidates and voters are thus seen to be inseparable. The question of whether the rights of the candidate or the rights of the supporters come first is nearly as indeterminate as the eternal question of the chicken and the egg. You cannot have one without the other. However, if forced to make a choice, then it must be urged that the relevant interest is that of the candidate, both as an individual and as a member of a disadvantaged group.

III.

CALIFORNIA'S FILING FEE REQUIREMENT DENIES POOR PERSONS THE RIGHT TO VOTE FOR CANDIDATES OF THEIR CHOICE, SOLELY BECAUSE OF THEIR ECONOMIC STATION, DEPRIVING THEM OF THE RIGHT OF FREE EXPRESSION AND ASSOCIATION FOR THE ADVANCEMENT OF POLITICAL BELIEFS GUARANTEED BY THE FIRST AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, AS WELL AS EQUAL PROTECTION OF THE LAWS.

The right to vote and to seek public office are necessary concomitants of the rights protected under the First Amendment to the United States Constitution, made applicable to the States through the Fourteenth Amendment. Unreasonable restrictions placed upon those rights impinge upon fundamental interests protected by the First Amendment as well as the right of the voters to cast their ballots effectively. *Williams v. Rhodes, supra; Zeilenga v. Nelson*, 4 C.3d 716, *supra; Harper v. Virginia State Board of Elections, supra; Jackson v. Olgilvie*, 325 F. Supp. 864 (1971).

The Court in *Carter v. Wischkaemper*, 321 F. Supp. 1358 (10 N.D. Tex. 1970) said at page 1361:

> "The right to choose one's candidate is not only a fundamental political right protected by the Fourteenth Amendment, it encompasses the First Amendment right to 'associate for the advancement of political beliefs.' "

Campaigns for any political office consist of rallies, campaign speeches by the candidate and his staff, distribution of leaflets. All are First Amendment activities—speech, publication, assembly. The opportunity to campaign is an opportunity to secure public

attention to one's views and to engage other candidates in debate of vital issues.

In *Kelso v. Cook*, 110 N.E. 987, 996 (S.Ct. Ind. 1916), the Court invalidated a filing fee provision requiring one percent of one year's salary to be paid. The Court said:

> "... The provision would compel candidates of minority parties, in counties where they have no hope of election, to contribute the same fee exacted of candidates of majority parties. The emoluments of office are not the chief, or even a leading, object in view in the formation or perpetuation of political parties. It is well recognized, especially in county and city governments, that the minority party often renders greater public service than the majority one. 9 R.C.L. 1082. It often happens that unrighteous policies are overthrown because of the patriotic courage of adherents of minority parties who permit their names to be used as candidates, though they do not desire to hold office. This provision would work serious harm to such public spirited movements."

In *Sweezy v. State of New Hampshire*, 354 U.S. 234, 250-251 (1957), this Court has more recently recognized that political activity can be an important occasion for political persuasion:

> "History has amply proved the virtue of political activity by minority, dissident groups, who innumberable times have been in the vanguard of democratic thought and whose programs were ultimately accepted. The absence of such voices would be a symptom of grave illness in our society."

First Amendment rights are fundamental to the preservation of a democratic society. *Hanover v. Northrup*, 325 F. Supp. 170 (D.C. Conn. 1970). It has been said that they are not absolute and are subject to reasonable

nondiscriminatory regulation governing time, manner and place. *Cantwell v. Connecticut*, 310 U.S. 296 (1940). But once it has been determined that state action impinges upon these rights, the interests of the state must be compelling to justify such interference. *N.A.A.C.P. v. Alabama*, 357 U.S. 449 (1958); *Sweezy v. New Hampshire, supra; Harper v. Virginia Board of Elections, supra; Williams v. Rhodes, supra.*

In the case of *McLaughlin v. Florida*, 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222 (1964), this Court indicated that the collection of revenue was a legitimate interest of the state. However, to qualify as *a compelling* state interest, the law must be "necessary, and not merely rationally related to the accomplishment of a permissible state policy."

A filing fee in effect is a prior restraint on First Amendment rights of expression and of association made applicable to the states through the Fourteenth Amendment. Any prior restraint must be viewed with a heavy presumption against its validity. *Organization For A Better Austin v. Keefe*, 399 U.S. 904 (1970); *Carroll v. Princess Anne*, 393 U.S. 175 (1968); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963).

As early as 1905, the Supreme Court of Nebraska struck down its election filing fees in the case of *State v. Drexel*, 105 N.W. 175, *supra*, on the grounds that the filing fee operated as a substantial impairment of the right of the electorate to choose freely its candidates for public office.

First Amendment rights are the crux and cornerstone of American democracy. The peoples' right to engage in wide-open debate, publication and assembly to review the actions of their government and to alter and replace it when necessary, are guaranteed thereby. *New York Times Co. v. United States*, 403 U.S. 713 (1971).

The political process, the acts of running for office, the waging of an active campaign, and the voting for political candidates, must be deemed to be included therein. Political actions are the most direct means of utilizing the First Amendment, made applicable to the states through the Fourteenth Amendment.

CONCLUSION

The judgment should be reversed.

Respectfully submitted,

MARGUERITE M. BUCKLEY
226 San Juan Avenue
Venice, California 90291
(213) 396-6876

A.L. WIRIN and
FRED OKRAND
ACLU Foundation of
Southern California
323 West Fifth Street
Los Angeles, California 90013
(213) 626-5156

Attorneys for Petitioner

John D. O'Loughlin
Jill Jakes
Of Counsel

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
JUL 31 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972

No. 71-6852

DONALD PAUL LUBIN, individually and on behalf of all others similarly situated,

Petitioner,

vs.

LEONARD PANISH, Registrar-Recorder of the County of Los Angeles,

Respondent.

BRIEF FOR RESPONDENT

JOHN H. LARSON,
County Counsel
County of Los Angeles
EDWARD H. GAYLORD,
Division Chief
648 Hall of Administration
500 West Temple Street
Los Angeles, California 90012
Telephone (1)213-97-41857
Attorneys for Respondent

WESTERN PRINTING COMPANY, WHITTIER—OXBOW 8-1722

TOPICAL INDEX

Page

Statement of the Case 1

Summary of Argument 1

I. The Fee Required by the California Elections Code Is A Reasonable Fee, the Requirement of Payment of Which Serves A Compelling State Interest As A Valid Test of the Good Faith of the Would-Be-Candidate and His Supporters 3

A. The Payment of A Filing Fee by A Candidate and His Supports Shows Good Faith Anticipation of A Reasonable Possibility of Nomination or Election 3

1. The State Has A Legitimate Interest in Regulating the Number of Candidates on the Ballot 3

2. If A Candidate Has Substantial Support Sufficient Funds Will Be Contributed To Pay A Reasonable Filing Fee 5

3. Neither the State Nor the County Should Pay Campaign Expenses 11

4. Since the Requirement of A Filing Fee Serves a Compelling State Interest, insofar As It May Bar A Frivolous Candidate from the Ballot It Does Not Discriminate Against the Poor 14

Page

B. The Filing Fee Is Reasonable In Amount.. 17

C. There Is No Other Practical Test of the Good Faith of A Candidate 19

D. The Elections Code Does Not Deny the Right of A Voter to Have His Vote Counted 20

E. Petitioner's Cases Are Not Persuasive 22

II. If the Constitution of the United States Requires An Alternative to Paying A Filing Fee, Candidates In California Have Such An Alternative 24

A. If Election Code § 18602 Requiring Payment of A Fee Before Write-in Votes Are Counted Renders Requirement of A Filing Fee To Go on Ballot Unconstitutional It Is § 18602 Not § 6554 (Which Requires A Filing Fee To Have Name Printed on Ballot) Which Is Unconstitutional 24

B. A Write-in Vote Is A Valid Alternate 28

C. Elections Code § 6555 (Candidate Nominated by Write-In Must Pay Filing Fee) Is Valid 31

D. Elections Code § 6555 Is Severable 33

III. The Filing Fee Requirement Does Not Impair the Right of Free Speech 35

Page

A. The Filing Fee Requirement Does Not Impair the Right to Campaign 35

B. A Candidate Who Has No Chance To Be Elected Is Not Entitled To A Place on the Ballot To Build Up Support in Future Elections 37

Conclusion 40

TABLE OF CASES AND AUTHORITIES CITED

Cases

Adderley v. Florida (1966) 385 U.S. 39, 47 38

Adkins v. Du Pont de Nemours Co., 335 U.S. 331 (1948) 12

Barreiro v. State Bar (1970) 2 Cal. 3d 912, 925, 88 Cal. Rptr. 192, 471 P. 2d 992, 1000 9

Batement v. Colgan (1896) 111 Cal. 580, 587, 44 P. 238, 240 32

Beneficial Loan Soc. Ltd. v. Haight (1932) 215 Cal. 506, 514, 11 P. 2d 857, 860 33

Blatz Brewing Co. v. Collins (1945) 69 Cal.App.2d 639, 650, 160 P.2d 37, 43 17

Blumenthal v. Board of Medical Examiners (1962) 57 Cal.2d 228, 238, 18 Cal. Rptr. 501, 506, 368 P.2d 101, 106 34

Bodner v Gray (Fla. 1961) 129 So.2d 419, 420, 89 A.L.R.2d 860, 863 19

Page

Broadrick v. State of Oklahoma (No. 71-1639, June 25, 1973) 41 Law Week 5111 10

Bullock v. Carter (1972) 405 U.S. 134 ..... 3, 5, 17, 18, 35

Champlain Rfg. Co. v. Commission (1932) 286 U.S. 210, 234 33

Chote v. Brown (U.S.D.C.N.D. Cal. 1972) 342 F. Supp. 1353 22

City of Los Angeles v. Lelande (1909) 11 Cal. App. 302, 307, 104 P. 717, 719 27

Crooks v. Peoples Finance etc. Co. (1930) III Cal. App. Supp. 769, 775 33

Curtis v. Board of Supervisors (1972) 7 Cal.3d 942, 964, 104 Cal.Rptr. 297, 312, 501 P. 2d 537 34

Danskin v. San Diego Unified School District (1946) 28 Cal.2d 536, 555, 171 P 2d 885, 897 26

Diffenderfer v. Porter Homer (D.C.S.D. Fla. No. 68-455, Cir. E.C.) 18

Dillon v. Fiorina (U.S.D.C.N.M. 1972) 340 F. Supp. 729 4

Diamond v. Allison (1973) 8 Cal. 3d 736, 737, 106 Cal. Rptr. 13, 14, 505 P. 2d 205 10

Dresser v. City of Torrance (1956) 140 Cal.App.2d 42, 48, 294 P.2d 962, 966 17

Douglas v. California, 372 U.S. 353 (1963) 13, 16

Eberle v. Michigan (1914) 232 U.S. 700, 705 26

Ellis v. Dixon (1955) 349 U.S. 458, 459 38

Escobedo v. State of California (1950) 35 Cal. 2d 870, 879, 222 P. 2d 1, 6 ..... 15, 16

Ex parte Fedderwitz, 6 Cal. Unrep. 562, 572 32

Page
Ferguson v. Keays (1970) 4 Cal. 3d 649, 94 Cal. Rptr. 398, 484 P. 2d 70 ..... 16, 19
Fowler v. Adams (D.S.M.D. Fla. 1970) 315 F. Supp. 592 18
Frost v. Corporation Commission (1929) 278 U.S. 515, 526 26
Gant v. Oklahoma City (1933) 289 U.S. 98, 102 14
Great Northern Ry Co. v. United States (1942) 315 U.S. 262, 267 32
Haag v. State of California (U.S.D.C.C.D. Cal. Aug. 2, 1970, No. 70-426-R) 28
Harper v Vance (U.S.D.C.N.D. Ala. S.D. 1972) 342 F Supp 136, 140 ..... 5, 23
Harper v. Virginia Board of Elections (1966) 383 U.S. 663 7
Hooker Application of (1955) 208 Misc. 188, 143 N.Y.S. 2d 750, 755 38
Jenness v. Little (U.S.D.C.N.D. Ga. 1969) 306 F. Supp. 925, 929 23
Keech v Joplin (1909) 157 Cal. 1, 9, 106 P. 222, 226 27
Kelso v. Cook (1916) 184 Ind. 173, 202, 110 N.E. 987, 997, Ann. Cas. 1918E 68, 78 ..... 35, 37
Matthews v. Little (1970) 397 U.S. 94 23
McDonough Power Equipment Co. v. Superior Court (1972) 8 Cal.3d 527, 534, 105 Cal.Rptr. 330, 335, 503 P.2d 1338, 1343 32
McGahey v. Virginia (1890) 135 U.S. 662, 701 18
Merced Falls Gas and Electric Company v. Turner (1906) 2 Cal.App. 720, 725, 84 P. 239, 241 4

Page

Mexican-American Political Association v. Brown (1973) 8 Cal. 3d 733, 734, 106 Cal. Rptr. 12, 13, 505 P. 2d 204 ..... 9, 10

Miller v. Childs (1915) 28 Cal. App. 478, 152 P. 972 30

Miller v. Union Bank and Trust Company (1936) 7 Cal. 2d 31, 36, 59 P. 2d 1024 1027 27

Mitchell v. Van Pelt (1954) 58 N.M. 69, 265 P.2d 679, 680, 42 A.L.R. 2d 1211, 1215 22

Montaldo v. Hires Bottling Co. (1943) 59 Cal.App. 2d 642, 649, 139 P.2d 666, 670 17

Orr v. Superior Court (Cal. App. 1968) 73 Cal. Rptr. 830, 835 16

Payne v. The City of San Francisco (1853) 3 Cal. 122, 128 32

People v. Campbell (1930) 110 Cal.App.Supp. 783, 786, 291 P. 161, 162 33

Pope v. Haimowitz (U.S. 1971) 404 U.S. 806 18

Reitz v. Mealey (1941) 314 U.S. 33, 38 26

Roberts v. Cleveland (1944) 48 N.M. 226, 149 P. 2d 120, 153 A.L.R. 635 28

Roylance v. San Luis Hotel Company (1887) 74 Cal. 273, 279, 20 P. 573, 579 17

Samuels v. Hite (1950) 35 Cal.2d 115, 216 P.2d 879 ..... 21, 36

San Antonio Independent School District v. Rodriguez (1973) 410 U.S. 13, 23

Schweitzer v. Clerk for City of Plymouth (1969) 381 Mich. 484, 164 N.W. 2d 35 23

Serfano v. Priest (1971) 5 Cal. 3d 584, 96 Cal.Rptr. 601, 487 P. 2d 1241 23

Page

Skyline Materials, Inc. v. City of Belmont (1961) 198 Cal. App. 2d 449, 459, 18 Cal. Rptr. 95, 101 ... 27
Spillers v. Slaughter (U.S.C.M.D. Fla. 1971) 325 F. Supp. 550 ... 18
State ex rel. Apodaca v. Fiorina (1972) 83 N.M. 663, 495 P.2d 1379, 1381 ... 4, 6, 17
State ex rel. O'Sullivan v. Swanson (1934) 127 Neb. 806, 257 N.W. 255 ... 29
Steiner v. Mihaly, No. S.F. 22965 ... 30
Tate v. Short, 401 U.S. 395 (1970) ... 13
Tiger v. Western Investment Co. (1910) 221 U.S. 286, 309 ... 32
Tilton v. Richardson (1971) 403 U.S. 672, 684 ... 33
Truax v. Corrigan (1921) 257 U.S. 312, 341 ... 26
Turner v. Fouche (1970) 396 U.S. 346 ... 22
United States v. Jackson (1968) 390 U.S. 570, 585 ... 33
United States v. Texas, 252 F. Supp. 234, 384 U.S. 155 ... 21
United States Civil Service Commission v. National Association of Letter Carriers, AFL-CIO (1973) 41 Law Week 5122, 5129 ... 33, 36
Varcoe v. Lee, 180 Cal. 338, 345 181 P. 223 ... 9
Waters-Pierce Oil Company v. State of Texas (1900) 177 U.S. 28, 47 ... 26
Watson v. Division of Motor Vehicles (1931) 212 Cal. 279, 298 P. 481 ... 14, 15
Wear v. State of Kansas (1917) 245 U.S. 154, 158 ... 10
West Tennessee A.C.L.U. v. City of Memphis (1971) 323 F.Supp. 234 ... 39

Page
Wetherington v. Adams (U.S.D.C.N.D. Fla. 1970) 309 F. Supp. 318, 321 ____ 6, 18, 28
Williams v. Illinois, 399 U.S. 235 (1970) ____ 13

Authorities

Code of Civil Procedures,
Section 2015.5 ____ 5

Elections Code,
Section 6554 ____ 40
Section 6555 ____ 24, 31, 32, 33, 34, 35
Section 18600 Division 10 ____ 24, 27
Section 18601 ____ 24
Section 18602 ____ 24
Section 18603 ____ 24, 25, 30

IN THE

Supreme Court of the United States

October Term, 1972

No. 71-6852

DONALD PAUL LUBIN, individually and on behalf of all others similarly situated,

Petitioner,

vs.

LEONARD PANISH, Registrar-Recorder of the County of Los Angeles,

Respondent.

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

We are satisfied with petitioner's statement of facts at pages 6-8 of his brief.

SUMMARY OF ARGUMENT

There is a compelling state interest in limiting the number of names printed on the ballot. The imposition of a reasonable filing fee (and the filing fees in California are reasonable) is a valid method to so limit the number of names. In the case of the impecunious candidate, the filing fee does not test his pocket book

but rather the extent of his support. Even if an impecunious candidate runs as a representative of the poor, as suggested by petitioner, if he has sufficient integrity, ability, diplomacy, and tact to enable him effectively to represent them, he will attract supporters among whom will be those who can and will make sufficient contributions to pay his filing fee and campaign expenses. If he does not have such support his name should not appear on the ballot.

Petitioner claims that the provision that no votes will be counted for any write-in candidate unless he files a declaration that he is a write-in candidate and pays the same filing fee as that required to obtain a place on the ballot, eliminates any alternative. This provision is reasonable so that non-serious write-in votes for those not candidates, e.g., Al Capone, John the 23d, Mickey Mouse, Superman, need not be counted, but if the lack of alternative renders the requirement of payment of a filing fee invalid, since the write-in provisions were first added in 1968, they, and not the filing fee for a place on the ballot, are unconstitutional, which leaves the impecunious candidate with an alternate means of running for office.

The prohibition of impairment of the right of free speech does not require a public body to supply the facilities to a person to publicize his views. Therefore there is no constitutional right to a place on the ballot as a means of self advertisement.

I

THE FEE REQUIRED BY THE CALIFORNIA ELECTIONS CODE IS A REASONABLE FEE, THE REQUIREMENT OF PAYMENT OF WHICH SERVES A COMPELLING STATE INTEREST AS A VALID TEST OF THE GOOD FAITH OF THE WOULD-BE-CANDIDATE AND HIS SUPPORTERS.

A. The Payment of a Filing Fee by a Candidate and his Supporters Shows Good Faith Anticipation of a Reasonable Possibility of Nomination or Election

1. The State has a Legitimate Interest in Regulating the Number of Candidates on the Ballot.

It is clear after reading the petitioner's brief that we do not agree on exactly what was decided in *Bullock v. Carter* (1972) 405 U.S. 134.[1] We approach with some hesitancy an attempt to tell the members of this Court what they meant when they either authored or concurred in such a recent opinion. We do rely upon the statement at page 145:[2]

> "The Court has recognized that a State has a legitimate interest in regulating the number of candidates on the ballot. * * * In so doing, the State understandably and properly seeks to prevent the clogging of its elective machinery, avoid voter confusion, and assure that the winner is the choice of a majority * * *."

---

[1] 92 S.Ct. 849, 31, L.Ed.2d 92.
[2] 92 S.Ct. at 857, 31 L.Ed.2d at 100-101.

This was quoted by *State ex rel. Apodaca v. Fiorina* (1972) 83 N.M. 663, 495 P.2d 1379, 1381 (Review now pending in this Court Nos. 71-1511, 71-1512). That court noted that *Dillon v. Fiorina* (U.S.D.C. N.M. 1972) 340 F.Supp. 729 invalidated the New Mexico filing fee and that thereafter (495 P.2d 1381):

> "* * * For the office of United States Senator, twenty-eight candidates filed for the Democratic nomination and twelve for the Republican. Of these, three Democrats and one Republican paid filing fees."

The purpose of the ballot is to determine who is the choice of the voters for nomination or election. There is no room on the ballot for one who, although actually desirious of the office for which he files knows that he does not have even a remote chance for nomination or election. No matter how desirous of the office he may be if he knows he has no chance to be either nominated or elected his candidacy is not in good faith.

We have been shown a letter from a high school principal in which he says that, as a class project, all of his students who are eligible to do so are going to run for public office.[3] The election machinery is not designed for this purpose.

---

[3]W recognize that this is not a part of the record as is also true of other examples which we shall give, but as said in *Merced Falls Gas and Eelectric Company v. Turner* (1906) 2 Cal.App. 720, 725, 84 P. 239, 241:

> "* * * This statement cannot be considered as a fact in the case, but it serves to illustrate the consequences which would inevitably follow the application of the doctrine for which appellant [petitioner] contends. * * *"

2. If a Candidate has Substantial Support Sufficient Funds will be Contributed to Pay a Reasonable Filing Fee.

In *Bullock v. Carter, supra,* at page 143[4] this Court says:

> "Unlike a filing fee requirement that most candidates could be expected to fulfill from their own resources *or at least through modest contributions* * * *." (emphasis added.)

Relying upon this case, in *Harper v. Vance* (U.S.D.C. N.D. Ala. S.D. 1972) 342 F. Supp. 136, 140, cited by petitioner at page 11, the court said in a footnote:

> "4. A finding of inability depends not only on a lack of personal resources, but also on a lack of funds contributed by supporters. * * *"

We find no allegation in petitioner's petition to the Supreme Court of California (App. pp. 2-8) or his accompanying declaration[5] (App. pp. 9-10) that his

---

[4]92 S.Ct. at 856, 31 L.Ed.2d at 100.

[5]Under California law this statement serves as an affidavit. Section 2015.5 of the Code of Civil Procedures as amended by Cal. Stats. 1963, chapter 2080 page 4346 reads:

> "2015.5. Whenever, under any law of this State or under any rule, regulation, order or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn statement, declaration, verification, certificate, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may with like force and effect be supported, evidenced, established or proved by the unsworn statement, declaration, verification, or certificate, in writing of such person stating the date and place of execution within this State and which is subscribed by him and certified or declared by him to be true 'under penalty of perjury,' which certification or declaration may be in substantially the following form:
>
> "I certify (or declare) under penalty of perjury that the foregoing is true and correct."

sponsors are unable to contribute enough to pay the modest filing fee.

We submit there is compelling logic in the opinion in *State ex rel. Apodaca v. Fiorina. supra* (1972) 83 N.M. 663, 495 P.2d 1379, 1384 (review by this Court requested, Nos. 71-1511, 71-1512) where the court said:

> "Thus viewed in its true light vis-a-vis the candidate of modest means, the filing fee requirement is not designed, nor does it have the effect of, precluding his entree to the ballot, provided he is a serious candidate. In the case of the impecunious candidate, the filing fee does not test his pocket book, but rather, the extent of his support. If he does not have the requisite support, he does not gain entree to the ballot and no harm is done because he had no occasion to be there. Yet, if he is a serious candidate, the filing fee is no impediment.
>
> "We find as a matter of fact that in New Mexico the serious candidate precluded from entree to the ballot by lack of funds does not exist."

We also submit as persuasive the statement in *Wetherington v. Adams* (U.S.D.C. N.D. Fla. 1970) 309 F.Supp. 318, 321:

> "* * * In order to assure serious political candidates it is reasonable to require a reasonable filing fee. A serious candidate for public office has traditionally attracted money for his candidacy. The inability to pay a reasonable filing fee might indicate a lack of potential political support for a person's candidacy."

At pages 9, 16, 21, 26, and 28 petitioner cites *Harper v. Virginia Board of Elections* (1966) 383 U.S. 663 holding invalid the requirement of payment of a poll tax as a prerequisite to voting. As a rule a voter, as distinguished from a candidate, cannot rely on friends or supporters to pay the poll tax for him. Besides, as stated in Footnote 1 on page 664:[6]

> "* * * Section 20 provides that a person must '*personally*' pay all state poll taxes for the three years preceding the year in which he applies for registration. * * *" (emphasis added.)

At page 20 petitioner says:

> "If a candidate cannot pay the filing fees in California, he cannot even be issued nomination papers on which to gather the signatures of his supporters. Although he may have the support of a large number of poor voters, he cannot appear on the ballot unless they are able to raise the amount of the filing fee for him. Obviously, any fees fall more heavily on the poor community."

Again, at page 22, petitioner continues:

> "* * * Candidates who would be most sympathetic to the needs of poor persons would probably come from the poor community and might have difficulty paying the filing fee. Their inability to do so would eliminate them as choices for poor voters resulting in a deprivation of the opportunity for meaningful representation."

[6] 86 S.Ct. 1079, 1080, 16 L.Ed.2d 169, 171.

In other words, petitioner pictures a poor candidate the supporters of whom are also uniformally so poor that none of them can make even modest contributions to the payment of a filing fee and campaign expenses.

It may be that one candidate may have a larger percentage of poor people among his supporters than does another candidate. Even if, however, the candidate's only platform is aid to the indigent and needy, his supporters will not necessarily be confined to that class. Many persons in comfortable circumstances, even wealthy persons, are aware of, and sympathetic with, the plight of those less fortunate. They will support the candidate if they have confidence in his integrity and ability. The petitioner in the case at bench has received the services of excellent attorneys worth many times the filing fee. This, as well as many other instances, does illustrate that persons by no means poor will donate both time and money to sponsor projects which they believe are for the benefit of the poor. Cynical as we are tempted to be at times it must be recognized that many voters will vote for propositions which are of no benefit to them. For example, the continuous extension of the franchise has been accomplished by those already possessing the right to vote. The Fifteenth Amendment was accomplished largely by the votes of Caucasians, the Nineteenth by the votes of men, the Twenty-sixth by the votes of those already over twenty-one years of age.

A person because he is poor may, for that reason, be motivated to take the part of others in the same un-

fortunate condition, although this is not always necessarily so. (When he receives the first installment of his salary as supervisor he no longer is poor.) Motivation, however, is not enough. In order to be effective in his efforts to ameliorate the plight of the poor, he must have, in addition to the qualifications required by law, a high degree of integrity, ability, diplomacy, and tact. If he has such qualifications he will attract supporters among whom will be many both able and willing to make sufficient contributions both to pay the modest filing fee and to effectively campaign.

If the petitioner in the case at bench had a large number of supporters none of whom could contribute he should have so alleged. We find no such allegation either in the petition itself (App. pp. 2-8) or in the statement under penalty of perjury attached thereto. (App. pp. 9-10).[7] It is not a matter of which either this Court or the Supreme Court of California can take judicial notice.

> "* * * If there is any doubt whatever either as to the fact itself or as to its being a matter of common knowledge, evidence should be required. (*Varcoe v. Lee,* 180 Cal. 338, 345 [181 P. 223].)"
>
> *Barreiro v. State Bar* (1970) 2 Cal.3d 912, 925, 88 Cal.Rptr. 192, 471 P.2d 992, 1000.

The court refused to take judicial notice that being first on a list of candidates on the ballot was an advantage in both *Mexican-American Political Associa-*

[7]See footnote 5 *supra.*

tion v. Brown (1973) 8 Cal.3d 733, 734, 106 Cal.Rptr. 12, 13, 505 P.2d 204; and *Diamond v. Allison* (1973) 8 Cal.3d 736, 737, 106 Cal.Rptr. 13, 14, 505 P.2d 205.

We cite these cases since judicial notice is a matter of state law. *Wear v. State of Kansas* (1917) 245 U.S. 154, 158.[8]

The champions of the poor are not confined to the poor, themselves. It would seem, therefore, well nigh impossible that a would-be-candidate would have extensive backing but backing consisting entirely of people so poor that they could not contribute. If that peculiar situation should ever arise it will then be time enough to decide whether the California Elections Code deprives such a would-be-candidate and his supporters of any constitutional rights. In *Broadrick v. State of Oklahoma* (No. 71-1639, June 25, 1973) 41 Law Week 5111 this Court upheld an Oklahoma statute which, among other provisions, prohibited a state employee from being a candidate for paid public office. At page 9 Slip Opinion, at page 5114, 41 Law Week this Court noted that the appellants:

> "* * * maintain that the statute is overbroad and purports to reach protected, as well as unprotected conduct, and must therefore be stricken down on its face and held to be incapable of any constitutional application. We do not believe that the overbreadth doctrine may appropriately be invoked in this manner here.

[8]38 S.Ct. 55, 56, 62 L.Ed. 214, 218.

"Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge the statute on the ground that it may conceivably be applied unconstitutionally to others in other situations not before the Court. * * *"

As we said before there is no allegation either in the petition (App. pp. 2-8) or in the accompanying statement under penalty of perjury (App. p. 9-10)[9] that the petitioner is supported by a large number of persons all of whom are too poor to contribute towards the modest filing fee. For aught that appears, petitioner had no support whatever and, had his name been on the ballot he would have received but a handful of votes. The petitioner is in no position to attack the application of the Elections Code to that peculiar situation which does not apply to him.

3. Neither the State nor the County should Pay Campaign Expenses.

At page 18 petitioner says:

"The costs of campaigning for elective public office are notoriously high, and indeed prohibitive for many prospective candidates otherwise qualified and having substantial popular support. For a poor candidate and his supporters proposing to finance a campaign on a low budget, the requirement of a $701.60 filing fee may make the differ-

[9]See footnote 5 *supra*.

ence between a candidacy which is viable and one which has no chance at all."

In other words no filing fee should be charged so that that small sum can be added to the campaign chest. The cost of campaigning being as notoriously high as petitioner states, the use of $701.60 for a filing fee should make no difference at all. When we said at the end of our Points and Authorities in the State Supreme Court (App. p. 37) quoted by petitioner at page 21:

> "* * * we do not concede, of course, that a poor person is necessarily unable to obtain the filing fee."

We did not ignore:

> "* * * the spirit of *Adkins v. Du Pont de Nemours Co.*, 335 U.S. 331 (1948), in which the Court ruled that a person need not be totally destitute to file in Forma Pauperis. * * *"

This Court did say at page 339:[10]

> "* * * We think an affidavit is sufficient which states that one cannot because of his poverty 'pay or give security for costs * * * and still be able to provide' himself and dependents 'with the necessities of life.' To say that no persons are entitled to the statute's benefits until they have sworn to contribute to payment of costs, the last dollar they have or can get, and thus make themselves and their dependents wholly destitute, would be to con-

[10] 69 S.Ct. 85, 89, 93 L.Ed. 43, 49.

strue the statute in a way that would throw its beneficiaries into the category of public charges. The public would not be profited if relieved of paying costs of a particular litigation only to have imposed on it the expense of supporting the person thereby made an object of public support. * * *"

Petitioner need not render himself an indigent and dependent upon county indigent relief but campaign expenses are not necessities of life. That some candidates have more campaign funds than do others does not result in an unconstitutional discrimination. As this Court said in *San Antonio Independent School District v. Rodriguez* (1973) 410 U.S. ..... Slip Opinion at page 17:[11]

"* * * in *Douglas v. California,* 372 U.S. 353, (1963), a decision establishing an indigent defendant's rights to court appointed counsel on direct appeal, the Court dealt only with defendants who could not pay for counsel from their own resources and who had no other way of gaining representation. *Douglas* provides no relief for those on whom the burdens of paying for a criminal defense are relatively speaking, great but not insurmountable. Nor does it deal with relative differences in the quality of counsel acquired by the less wealthy.

"*Williams v. Illinois,* 399 U.S. 235 (1970), and *Tate v. Short,* 401 U.S. 395 (1970), struck down criminal penalties that subjected indigents to incarceration simply because of their inability to

[11]93 S. Ct. 1278, 1290, 36 L.Ed.2d 16, 36.

pay a fine. Again, the disadvantaged class was composed only of persons who were totally unable to pay the demanded sum. Those cases do not touch on the question whether equal protection is denied to persons with relatively less money on whom designated fines impose heavier burdens. The Court has not held that fines must be structured to reflect each person's ability to pay in order to avoid disproportionate burdens. Sentencing judges may, and often do, consider the defendant's ability to pay, but in such circumstances they are guided by sound judicial discretion rather than by constitutional mandate."

4. Since the Requirement of a Filing Fee serves a Compelling State Interest, insofar as it may bar a Frivolous Candidate from the Ballot it does not Discriminate against the Poor.

We assume that petitioner's argument is based on the premise that the requirement of a filing fee does not serve any compelling state interest. We also assume that petitioner concedes that if it be shown that it does serve such a purpose then it is valid even if it makes impossible the candidacy of a person having neither funds of his own nor supporters. In *Gant v. Oklahoma City* (1933) 289 U.S. 98, 102[12] this court held valid requiring a license and posting of a bond in order to drill an oil well in the city even as to one who could not obtain a bond. The theory on which this decision was based is well stated in *Watson v.*

[12]53 S.Ct. 530, 532, 77 L.Ed. 1058, 1062.

Division of Motor Vehicles (1931) 212 Cal. 279, 298 P. 481. In that case the court held valid Section 73(g) of the former California Vehicle Act which provided that fifteen days after a judgment against a motorist for damages on account of personal injury or for damages to property in excess of one hundred dollars became final, if the judgment had not been paid the motorist's driver's license would be suspended until it was paid. It was contended that this was a discrimination against the poor and unconstitutional on the ground that, under its terms, a person's license to operate a motor vehicle was made dependent upon his ability to pay and discharge judgments rather than upon his ability to operate such vehicle. The court held to the contrary, saying, at page 284:[13]

> "* * * The fallacy in this argument lies in the failure to distinguish between equality of opportunity and ability to take advantage of the opportunity which is offered to all. The equality of the Constitution is the equality of right and not of enjoyment. * * *"

This is quoted with approval by *Escobedo v. State of California* (1950) 35 Cal.2d 870, 878, 222 P.2d 1, 6, the court adding:

> "* * * Those who cannot afford to possess automobiles are as little able to enjoy the opportunity of driving on the public highways as those who cannot afford insurance or security."

[13] 298 P. at p. 483.

At page 16 the petitioner cites *Ferguson v. Keays* (1970) 4 Cal.3d 649, 94 Cal.Rptr. 398, 484 P.2d 70 where, because of poverty, the $50.00 fee for filing a record on appeal was waived. The distinction between that case and the case at bench is explained in *Orr v. Superior Court* (Cal.App. 1968) 73 Cal. Rptr. 830, 835 in which the court after quoting from *Escobedo, supra,* said:

> "* * * The denial of counsel on appeal to an indigent defendant in a criminal proceeding may draw an 'unconstitutional line . . . between rich and poor' (see *Douglas v. California* (1963) 372 U.S. 353, 357 [9 L.Ed. 2d 811, 814, 83 S.Ct. 814]), because the pecuniary ability to secure counsel is not rationally related to the right or privilege to have the conviction reviewed. There is, however, a rational relationship between the pecuniary ability to respond in damages and the operation of a motor vehicle. * * *"

The State Supreme Court granted a hearing on February 5, 1969 and came to the same ultimate conclusion as did the Court of Appeal that the petition for writ of prohibition be denied. 71 Cal.2d 220, 77 Cal.Rptr. 816, 454 P.2d 712.[14] The opinion of the Court

---

[14] Both *Escobedo* v. *State of California, supra,* and *Orr* v. *Superior Court,* were overruled on other grounds by *Rios v. Cozens* (1972) 7 Cal.3d 792, 799, 103 Cal.Rptr. 299, 304, 499 P.2d 979 but nothing in the latter case disapproves the reasoning of the Court of Appeal quoted by us in *Escobedo, supra.*

of Appeal is not precedent therefore, but we quote it for the reasoning therein contained.[15]

B. The Filing Fee is Reasonable in Amount.

In *Bullock v. Carter, supra* (1972) 405 U.S. 134, 143,[16] this Court said:

> "Unlike a filing fee requirement which most candidates could be expected to fulfill from their own resources or at least through modest contributions, the very size of the fees imposed under the Texas system gives it a patently exclusionary character. * * *"

The California filing fees are set by statute, not by political parties as was the case in Texas. In the case at bench the filing fee is but two per cent of the first year's salary. As noted by *State ex rel. Apodaca v. Fiorina, supra* (1972) 83 N.M. 663, 495 P.2d 1379, 1384 (Review by this Court requested, Nos. 71-1511, 71-1512):

> "* * * The modest six per cent does not leap from the page as does the 99.7 percent Texas fee for one office recounted in Bullock."

---

[15]Without in any way relying upon opinions of the Court of Appeal as precedent where the State Supreme Court has granted a hearing, California courts have cited such opinions for the persuasiveness of the reasoning contained therein. *Roylance* v. *San Luis Hotel Company* (1887) 74 Cal. 273, 279, 20 P. 573, 579; *Dresser v. City of Torrance* (1956) 140 Cal.App.2d 42, 48, 294 P.2d 962, 966; *Blatz Brewing Co.* v. *Collins* (1945) 69 Cal. App.2d 639, 650,160 P.2d 37, 43; *Montaldo v. Hires Bottling Co.* (1943) 59 Cal.App.2d 642, 649, 139 P.2d 666, 670.

[16]92 S.Ct. 849, 856, 31 L.Ed.2d 92, 100.

In *Bullock, supra* at page 149[17] this Court has compared a fee imposed on a candidate with a license fee. A license fee so large as to in effect prohibit a legitimate business has been held confiscatory and unconstitutional, *McGahey v. Virginia* (1890) 135 U.S. 662, 701,[18] but we have found no case holding a reasonable license fee to be invalid as applied to some one having no money to pay it.

Requirements in the State of Florida that a candidate pay a fee of five per cent of the annual salary have been held to be reasonable in a number of cases.

Spillers v. Slaughter (U.S.D.C.M.D. Fla. 1971) 325 F.Supp. 550 in which at page 553 the court held that there was a compelling state interest requiring the fee. (Under the title *Pope v. Haimowitz* (U.S. 1971) 404 U.S. 806,[19] this Court vacated the judgment and remanded the case to the District Court with directions to dismiss as moot.)

Wetherington v. Adams, supra (D.C.N.D. Fla. 1970) 309 F.Supp. 318;

Fowler v. Adams (D.S.M.D. Fla. 1970) 315 F. Supp. 592 at 594;

Diffenderfer v. Porter Homer (D.C.S.D. Fla. No. 68-455, Cir.E.C.), unreported but cited by *Spillers v. Slaughter, supra;*

---

[17]92 S.Ct. 849, 859, 31 L.Ed.2d 92, 103.

[18]10 S.Ct. 972, 984, 34 L.Ed. 304, 316.

[19]92 S.Ct. 55, 30 L.Ed.2d 37.

A filing fee of $875 was held reasonable for a candidate for justice of the State Supreme Court in *Bodner v. Gray* (Fla. 1961) 129 So.2d 419, 420, 89 A.L.R.2d 860, 863 (and note annotation at page 864.)

C. There is no other Practical Test of the Good Faith of a Candidate.

At page 14 petitioner says:

> "In *Ferguson v. Keays,* 4 C.3d 649, 94 Cal. Rptr. 398, 484 P.2d 70 (1970), the California Supreme Court approved in principle the waiver of the $50 fee for filing a record on appeal despite the argument that filing fees defray the costs of courts and discourage unnecessary litigation."

The following portion of the opinion in that case, 4 Cal.3d at 658, 94 Cal.Rptr. at 403, 484 P.2d at 75 illustrates the difference between determining the good faith of an appellant and the good faith of a candidate:

> "Thus, there is ample precedent for requiring, as a condition to the grant of in forma pauperis relief, that each applicant establish to the court's satisfaction that he is in fact indigent and that his claim or defense is not wholly frivolous. With respect to applications for such relief at the appellate level, we believe that the applicant should, at a minimum, submit (1) the certificate of his counsel, declaring that he is familiar with the facts underlying the action or appeal, that in his opinion his client's contentions have merit, and that the

action or appeal is brought in good faith and not for purposes of delay or harassment, and (2) the declaration of the applicant, executed under penalty of perjury, stating that he is unable to pay the requisite filing fee without depriving himself or his dependents of the necessaries of life, and briefly setting forth the facts which disclose his indigence."

Petitioner has suggested no other way in which the good faith of a candidate can be tested. He might be required to submit an affidavit that he has supporters and, at least, a remote chance of success, but any candidate could file such an affidavit without fear of prosecution for perjury since the affidavit would be largely an opinion the falsity of which would be impossible to prove.

D. The Elections Code does not Deny the Right of a Voter to have his Vote Counted.

At page 23 petitioner says:

"If poor people cannot run candidates from within their own community for lack of resources, then the right to vote and the constitutional guarantees of respresentation are meaningless. * * *"

If petitioner should convince this Court that the Election Code unconstitutionally denies the right to be a *candidate* then whether or not it also denies the rights of the voters need not be decided. It is only if it is determined that no rights of the *candidate* is in-

fringed that this contention becomes material. In *Samuels v. Hite* (1950) 35 Cal.2d 115, 216 P.2d 879 the court directed that the name of a candidate for office of judge of a justice court be removed from the ballot because he was not eligible for that office. Obviously no one has a constitutional r i g h t to have his vote counted for a candidate who is ineligible for the office he seeks.[20] By analogy, no one has a constitutional right to have his vote counted for one who fails to qualify as a candidate.

At page 21 petitioner says:

> "Assume that the candidate could collect $1.00 from each of 702 persons in his community to meet the filing fee requirement for Board of Supervisors in Los Angeles County. But then to the extent that these 702 voters have been *required* to contribute funds in order to have their vote recorded for the candidate of their choice, they have been required to pay an indirect poll tax. Such a tax has been proscribed in *United States v. Texas,* 252 F. Supp. 234, 384 U.S. 155, *supra* * * *."

This argument proves too much. Assume that a group of voters urge a voter to be a candidate. Assume, also, either that the office does not require a filing fee or that the proposed candidate has ample funds of his own with which to pay the filing fee. The candidate might say:

---

[20]This, of course, does not apply to a candidate for member of a legislative body which body is the exclusive judge of the qualification of its members. The Board of Supervisors is not such an exclusive judge.

"I am unwilling to be a candidate unless you will contribute sufficient funds for an effective campaign."

In that situation can it be said that those urging his candidacy must pay what amounts to a poll tax in order to vote for him? In that case the candidate says he cannot afford to run unless he has financial support. It is the same if the candidate cannot pay his filing fee from his own funds. He refuses to be a candidate unless his supporters give him financial aid.

E. Petitioner's Cases Are Not Persuasive.

We, already, have cited and distinguished some the cases cited by the petitioner.

At pages 7 and 18 petitioner cites *Chote v. Brown* (U.S.D.C.N.D. Cal. 1972) 342 F.Supp. 1353 (remanded 93 S.Ct. 1732, 36 L.Ed.2d 420). We submit that the dissenting opinion is far more persuasive than that of the majority.[21]

At pages 8, 11, and 27 petitioner cites *Turner v. Fouche* (1970) 396 U.S. 346 in which this Court held invalid a requirement that a member of the school board must be a property owner. This Court however, also said, at page 364:[22]

"* * * Without excluding the possibility that

[21] In *Mitchell* v. *Van Pelt* (1954) 58 N.M. 69, 265 P.2d 679, 680, 42 A.L.R. 2d 1211, 1215 the court said:
"*** when the problem is one of first impression in our own jurisdiction, dissenting opinions from Courts of other states can assist this Court in determining the better of two lines of authority."

[22] 90 S.Ct. 532, 542, 24 L.Ed.2d 567, 581.

other circumstances might present themselves in which property qualification for office-holding could survive constitutional scrutiny * * *"

About five weeks after this decision, this Court denied certiorari (397 U.S. 906)[23] in *Schweitzer v. Clerk for City of Plymouth* (1969) 381 Mich. 484, 164 N.W. 2d 35 at 39 which held that ownership of real property was a valid qualification for holding a city office.

In both *Harper v. Vance, supra* (U.S.D.C.N.D. Ala. S.D. 1972) 342 F.Supp. 136 at 143 cited by petitioner at page 11 and *Jeness v. Little* (U.S.D.C.N.D. Ga. 1969) 306 F.Supp. 925, 929 (Appeal dismissed as moot, sub nominee *Matthews v. Little* (1970) 397 U.S. 94)[24] cited at pages 10 and 11 it seems to be assumed that no filing fee whatever may be charged directly contrary to this Court's decision in *Bullock, supra.*

At page 14 petitioner relies upon *Serrano v. Priest* (1971) 5 Cal.3d 584, 96 Cal.Rptr. 601, 487 P.2d 1241. This case was cited eight times by *San Antonio Independent School District v. Rodriguez, supra* (1973) 410 U.S. ___ at ___ Slip Opinion pp. 11, 14, 18, 23, 25, 38, 51-52, and 53[25] and, at least insofar as any question under the Constitution of the United States was concerned, impliedly was overruled.

---

[23] 90 S.Ct. 896, 25 L.Ed.2d 86.

[24] 90 S.Ct. 820, 25 L.Ed.2d 81.

[25] 93 S.Ct. 1278, 1287, 1289, 1291, 1293, 1294, 1301, 1308, 1309, 36 L.Ed.2d 16, 32, 34, 37, 39, 40, 48, 56, 57.

II

IF THE CONSTITUTION OF THE UNITED STATES REQUIRES AN ALTERNATIVE TO PAYING A FILING FEE, CANDIDATES IN CALIFORNIA HAVE SUCH AN ALTERNATIVE.

A. If Elections Code § 18602 Requiring Payment of a Fee before Write-in Votes are Counted renders Requirement of a Filing Fee to go on Ballot Unconstitutional it is § 18602 not § 6554 (which requires a filing fee to have Name printed on Ballot) which is Unconstitutional.

Chapter 8.5 (beginning with Section 18600) of Division 10 of the Elections Code provides for the counting of write-in votes. It requires that a person desiring to be a write-in candidate file a statement to that effect with the registrar-recorder at least eight days prior to the election. Section 18603 reads:

> "18603. No name written upon a ballot in any state, county, city, city and county, or district election shall be counted for an office or nomination unless
>
> "(a) A declaration has been filed pursuant to Sections 18601 and 18602 declaring a write-in candidacy for that particular person for that particular office or nomination and
>
> "(b) The fee required by Section 6555 is paid when the declaration of write-in candidacy is filed pursuant to Section 18602."

These provisions are reasonable and make it unnecessary to count votes for persons (or for comic strip characters such as Mickey Mouse) who are not candidates at all. We are informed that voters have written in names of John the 23d, John Doe, Joe Doe, Joe Blow, Dick Tracy, Mortimer Snud [Snerd], Khrushchev, Al Capone, Annie Oakley as well as real persons who received one or two votes each.

Petitioner at pages 13 and 17 stresses that because of the provisions of subdivision (b) of Section 18603 of the Elections Code there is no alternative to paying the filing fees.

Let us assume (without conceding) that the requirement of a filing fee to have a candidate's name printed on the ballot is invalid (at least as applied to a candidate where neither he nor his supporters can pay it) unless there is some alternative such as candidacy by write-in.

Chapter 8.5 (beginning with Section 18600) was first added to Division 10 of the Elections Code by California Statutes 1968, chapter 79, page 236 which took effect as an urgency measure on May 9, 1968 so as to be in effect for the June 4, 1968 primary. Prior thereto all write-in votes were counted although no fee had been paid. We shall show *infra* p. 28 that the opportunity to nominate or elect a candidate by write-in is a valid alternate. Therefore, prior to May 9, 1968 the requirement of payment of a fee to have a candidate's name printed on the ballot was valid.

Where unconstitutionality results from a statutory amendment it is the amendment which is invalid and not the original portions of the statute.

Frost v. Corporation Commission (1929) 278 U.S. 515, 526;[26]
Truax v. Corrigan (1921) 257 U.S. 312, 341;[27]
Eberle v. Michigan (1914) 232 U.S. 700, 705.[28]

As said by this Court in *Waters-Pierce Oil Company v. State of Texas* (1900) 177 U.S. 28, 47:[29]

"* * * It is either constitutional or unconstitutional. If it is constitutional the plaintiff in error has no legal cause to complain of it. If unconstitutional, it does not effect the act of 1889, and that, as we have seen, imposes a valid condition upon the plaintiff in error * * *."

This Court said in *Reitz v. Mealey* (1941) 314 U.S. 33, 38-39:[30]

"* * * under the law of New York, a statute in itself constitutional is not affected by an unconstitutional amendment;—the amendment dropping out and the original act remaining in force * * *"

The Courts in California are in accord.

Danskin v. San Diego Unified School District (1946) 28 Cal.2d 536, 555, 171 P.2d 885, 897;

---

[26] 49 S.Ct. 235, 239, 73 L.Ed 483, 490.
[27] 42 S.Ct. 124, 132-133, 66 L.Ed. 254, 267, 27 A.L.R. 375, 390.
[28] 34 S.Ct. 464, 465, 58 L.Ed. 803, 805.
[29] 20 S.Ct. 518, 525, 44 L.Ed. 657, 665.
[30] 62 S.Ct. 24, 28, 86 L.Ed. 21, 25.

Miller v. Union Bank and Trust Company (1936) 7 Cal.2d 31, 36, 59 P.2d 1024, 1027 (Certiorari denied 299 U.S. 612):[21]

Keech v. Joplin (1909) 157 Cal. 1, 9, 106 P. 222, 226;

Skyline Materials, Inc. v. City of Belmont (1961) 198 Cal.App.2d 449, 459, 18 Cal. Rptr. 95, 101;

City of Los Angeles v. Lelande (1909) 11 Cal. App. 302, 307, 104 P. 717, 719.

If it be assumed that an alternate not requiring a fee, is necessary then it is either Chapter 79 of the California Statutes of 1968 which added Chapter 8.5 to Division 10 of the Elections Code or subdivision (b) of Section 18603 (a part of Chapter 8.5) which is unconstitutional leaving the remainder of the Elections Code insofar as fees are concerned as it read prior to 1968.

Section 14 of Senate Bill No. 1236 as amended in the California Senate on June 15, 1973 will, if enacted as so amended, amend Section 18603 of the Elections Code to eliminate paragraph (b) thereof and thereby eliminate the requirement of any fee for a write-in candidate. If this bill is enacted so as to make this amendment, we shall inform the Court by supplementary brief.

---

[21] 157 S.Ct. 314, 81 L.Ed. 451.

B. A Write-in Vote is a Valid Alternate.

In *Wetherington v. Adams, supra* (U.S.D.C.N.D. Fla. 1970) 309 F.Supp. 318, 320 the court said:

> "* * * Additionally, the filing fee precondition does not constitute a total denial to persons desirous of candidacy of having votes cast for them and counted; they can run as write-in candidates by following the non-cost procedures of Fla. Stat. § 99.023 * * *."

At page 322 the court continued:

> "* * * There may be some disadvantages to a write-in candidacy but it does provide a means whereby any citizen, regardless of his political support or his individual wealth, can present himself to the voters for their consideration."

In the unreported case of *Haag v. State of California* (U.S.D.C.C.D. Cal. Aug. 2. 1970, No. 70-426-R) the court said:

> "2. A write-in candidacy is as constitutionally acceptable a method of running for public office as appearing on the printed election ballot."

In *Roberts v. Cleveland* (1944) 48 N.M. 226, 149 P.2d 120, 153 A.L.R. 635 a section in the New Mexico election laws providing that no person shall become a candidate for nomination for any office who has changed his party affiliation within twelve months prior to the issuance of the Governor's proclamation was attacked on the claim that it attempted to add to

the qualifications of persons who are qualified to hold the office of Representative in Congress of the United States. In rejecting this contention the court said (149 P.2d at 122, 153 A.L.R. at 638):

> "* * * The right to be a candidate at the general election by the 'write in' method is provided for. He may be such a candidate, independently of all parties * * *."

The distinction between being a candidate and having one's name printed on the ballot was also explained in *State ex. rel. O'Sullivan v. Swanson* (1934) 127 Neb. 806, 257 N.W. 255. A Nebraska statute provided that a candidate defeated in the primary could not have his name printed on the ballot at the general election as an independent candidate. The court construed this prohibition as applying to any office not only the office for which the candidate was defeated in the primary. In holding that this statute prohibited one defeated in the primary for nomination for Governor from having his name on the ballot at the general election as a candidate for the United States Senate, the court said, at pages 255 and 256:

> "* * * The issue here is whether the relator is entitled to have his name printed on the ballot as a candidate nominated by petition, regardless of the Driscoll decision because the office relator seeks is a federal office rather than a state office. The question is not whether he may be a candidate, but whether he may be nominated by petition and

have his name printed on the ballot at the state's expense. He may be a candidate and if electors write his name on the ballot in sufficient numbers he will be elected."

So far as we can find neither of these last two cases has been overruled or disapproved. We submit that the reasoning in each is persuasive and should be followed.

Candidates have been elected by write-in. For example in *Miller v. Childs* (1915) 28 Cal.App. 478, 152 P. 972 a candidate at the primary for the office of Superior Court judge received a majority of all votes cast and, under the Direct Primary Law, as it then read, was the only candidate whose name appeared on the ballot for the general election. J. L. Childs, the candidate (or a candidate)[22] defeated in the primary for that same office conducted a write-in campaign and was elected.

Also, it cannot be said that because of the existence on the statute books of Section 18603 of the Elections Code it would be impossible to conduct a write-in campaign. In *Steiner v. Mihaly,* No. S.F. 22965 on October 18, 1972 the Supreme Court of California made the following interim order:

"It is hereby ordered that respondents Emmery Mihaly * * * Edmund G. Brown, Jr., Secretary of State of California, accept without requiring the payment of the fee prescribed by Sections 6555 and 18603, subdivision (b) of the Elec-

[22]Although not appearing in the reported opinion the transcript on appeal in this case, No. Third Civil 1396 shows that J. L. Childs was the only candidate.

tions Code, the declaration of write-in candidacy of petitioner Herbert Steiner for the office of Member of the House of Representatives of the United States from the Fifth Congregressional District of California, at the general election to be held November 7, 1972, if said declaration is offered to said respondent Registrar of Voters in proper form and within the time prescribed by law, and that said respondents count and record all votes cast for such petitioner in such election, reserving to this court jurisdiction to determine whether such filing fee prescribed by the aforesaid sections of the Elections Code is lawfully required."

C. Elections Code § 6555 (Candidate nominated by Write-In must Pay Filing Fee) is Valid.

In his Points and Authorities filed in the State Supreme Court (App. p. 15) the petitioner said:

"* * * Even before write-in votes will be counted, the filing fees must be paid under Elections Code Section 6555."

The section does not so provide. It reads:

"6555. When a person for whom a declaration of candidacy has not been filed is nominated for an office by having his name written on the ballot, he shall pay the same filing fee that would have been required if his declaration had been filed. If he does not pay that fee his name shall not be printed on the ballot at the ensuing general election."

The section clearly specifies that it is only after a candidate has been nominated that he must pay the filing fee. The enactment of Section 18603 of the Elections Code in 1968 specifically requiring the payment of a fee by a write-in candidate before write-in votes will be counted is a legislative construction of Section 6555 that that section does not do so.

"* * * subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject. * * *"

Tiger v. Western Investment Co. (1910) 221 U.S. 286, 309;[33]

Great Northern Ry Co. v. United States (1942) 315 U.S. 262, 277.[34]

This is the law in California.

McDonough Power Equipment Co. v. Superior Court (1972) 8 Cal. 3d 527, 534, 105 Cal.Rptr. 330, 335, 503 P.2d 1338, 1343, footnote 5;

Bateman v. Colgan (1896) 111 Cal. 580, 587, 44 P. 238, 240;

Payne v. The City of San Francisco (1853) 3 Cal. 122, 128.

"* * * even an unconstitutional part of a statute may be examined for the purpose of ascertaining the scope and effect of the valid parts thereof. (*Ex parte Fedderwitz,* 6 Cal.Unrep. 562, 572 [62 Pac. 935, 940]; 36 Cyc. 1131, 1132.)"

[33]31 S.Ct. 578, 584, 55 L.Ed. 738, 747.
[34]62 S.Ct. 529, 535, 86 L.Ed. 836, 844.

Crooks v. People Finance etc. Co. (1930) 111 Cal. App.Supp. 769, 775, 292 P. 1065;

Beneficial Loan Soc. Ltd. v. Haight (1932) 215 Cal. 506, 514, 11 P.2d 857, 860.

Accord, *People v. Campbell* (1930) 110 Cal.App. Supp. 783, 786, 291 P. 161, 162.

If a candidate receives sufficient votes to be nominated for a nonpartisan office, there should be no difficulty in obtaining from supporters the filing fee.

D. Elections Code § 6555 is Severable.

If there is any question as to the validity of Section 6555 of the Elections Code it is clearly severable. As this Court said in *United States Civil Service Commission v. National Association of Letter Carriers, AFL-CIO* (1973) 41 Law Week 5122, 5129, Slip Opinion p. 22.

> "* * * As we see it, our task is not to destroy the Act if we can, but to construe it, if consistent with the will of Congress, so as to comport with constitutional limitations. * * *"

In both *Tilton v. Richardson* (1971) 403 U.S. 672, 684,[35] and *United States v. Jackson* (1968) 390 U.S. 570, 585[36] this Court quotes, as follows, from *Champlain Rfg. Co. v. Commission* (1932) 286 U.S. 210, 234:[37]

---

[35] 91 S.Ct. 2091, 2098, 29 L.Ed.2d 790, 802 (rehearing denied, 404 U.S. 874, 92 S.Ct. 25, 30 L.Ed.2d 120).

[36] 88 S.Ct. 1209, 1218, 20 L.Ed.2d 138, 149.

[37] 52 S.Ct. 559, 565, 76 L.Ed.2d 1062, 1078, 86 A.L.R. 403, 413.

"* * * The unconstitutionality of a part of an Act does not necessarily defeat * * * the validity of its remaining provisions. Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law. * * *"

Section 6555 could be eliminated entirely from the Elections Code and what would be left would be:

"* * * fully operative as a law. * * *"

Section 48 of that code reads:

"48. If any provision of this code or the application thereof to any person or circumstance is held invalid, the remainder of the code and the application of such provision to other persons or circumstances shall not be affected thereby."

After quoting a similar provision in the Business and Professions Code the court said in *Blumenthal v. Board of Medical Examiners* (1962) 57 Cal.2d 228, 238, 18 Cal.Rptr. 501, 506, 368 P.2d 101, 106:

"* * * The test of severability is whether the invalid parts of the statute can be severed from the otherwise valid parts without destroying the statutory scheme, or the utility of the remaining provisions. * * *"

This is quoted and followed by *Curtis v. Board of Supervisors* (1972) 7 Cal.3d 942, 964, 104 Cal.Rptr. 297, 312, 501 P.2d 537.

Section 6555 meets this test. Its elimination would not affect the remainder of the Elections Code in any way.

In *Kelso v. Cook* (1916) 184 Ind. 173, 202, 110 N.E. 987, 997, Ann.Cas. 1918E 68, 78 from which petitioner quotes at page 27 of his brief the court held severable from the direct primary law a provision requiring fees for printing names of candidates on the ballot.

III

THE FILING FEE REQUIREMENT DOES NOT IMPAIR THE RIGHT OF FREE SPEECH.

A. The Filing Fee Requirement does not Impair the Right to Campaign.

Petitioner contends that the Election Code denies the right of free speech and assembly. In a situation such as *Bullock v. Carter, supra* where the election laws deny a constitutional right to be a candidate and, indirectly, a constitutional right to have one's vote counted for the candidate of one's choice, a decision to that effect is all that one desiring to be a candidate needs and, whether or not the election laws also deny the right of free speech and assembly need not be determined.

We submit, therefore, that whether or not *Mr. Lubin* has been denied the right of free speech or public assembly is material only if it is decided that no right

to be a candidate or to have a vote counted otherwise has been impaired. At page 26 petitioner says:

> "Campaigns for any political office consist of rallies, campaign speeches by the candidates and his staff, destribution of leaflets. All are First Amendment activities—speech, publication, assembly. The opportunity to campaign is an opportunity to secure public attention to one's views and to engage other candidates in debate of vital issues."

This is an ingenious argument but it proves too much. In *Samuels v. Hite, supra* (1950) 35 Cal.2d 115, 216 P.2d 879 the court held that the name of a candidate for office of judge of a justice court must be removed from the ballot because he did not have the required qualifications. Petitioner would say that the right of free speech of his supporters had been impaired because no urging of voters to vote for him would be effective. Petitioner's argument extended to its logical conclusion goes even further. The right to urge people to vote for a candidate is impaired if that candidate cannot take office. Therefore to require a judge or district attorney to be admitted to practice law or a health officer to be admitted to practice medicine impairs the right of free speech and assembly.

This Court said, in *United States Civil Service Commission v. National Association of Letter Carriers, AFL-CIO, supra* (1973) 41 Law Week 5122, 5124, Slip Opinion p. 7.

> "We unhesitantly reaffirm the *Mitchell* hold-

ing * * *. An Act of Congress * * * would in our view unquestionably be valid * * * if, in plain and understandable language, the statute forbade activities such as * * * becoming a partisan candidate for, or campaigning for, an elective public office * * *. Our judgment is that neither the First Amendment nor any other provision of the Constitution invalidates a law barring this kind of partisan political conduct by federal employees."

B. A Candidate Who has No Chance to Be Elected is not Entitled to a Place on the Ballot to Build up Support in Future Elections.

At page 27 the petitioner quotes from *Kelso v. Cook, supra* (1916) 184 Ind. 173, 202, 110 N.E. 987, 996, Ann.Cas. 1918E 68, 78 in which the court held the Indiana primary law valid but held invalid the provision requiring a filing fee equal to one per cent of the first year's salary on the ground that it was discriminatory as to minor political parties. We submit that the reasoning of the court is most unconvincing. Besides, the decision seems to be based upon provisions of the Indiana State Constitution as appears from that portion of the opinion immediately following that quoted by petitioner:

"It may be as contended, that in some jurisdictions, provisions quite similar to this have been upheld by the courts, but it is believed that in such cases, there are constitutional provisions differing from ours. * * *"

The right of a new political party to be on the ballot is not the same as that of a private individual.

If petitioner is not a serious candidate his right of free speech does not require that he be permitted a place on the ballot to advertise himself and make his name known to the public. Government may not prohibit or cast obstacles in the way of the exercise of free speech but it is under no affirmative duty to provide facilities for its exercise. For example, while California has permitted its public school buildings to be used in the evening for non-school meetings such as, for example, political discussions it is not required to do so. As this Court has said in *Ellis v. Dixon* (1955) 349 U.S. 458, 459:[88]

> "Petitioner concedes that a State may withhold its facilities altogether from use by nonscholastic groups. * * *"

The right of free speech does not permit the use of publicly owned property which is not open to the public. *Adderley v. Florida* (1966) 385 U.S. 39, 47.[89]

The court said in *Application of Hooker* (1955) 208 Misc. 188, 143 N.Y.S.2d 750, 755:

> "While there are constitutional rights of free speech and freedom of assembly, there is no constitutional privilege to exercise these rights in a fire house auditorium. There is no constitutional

---

[88]75 S.Ct. 850, 852, 99 L.Ed. 1231, 1234 (rehearing denied 350 U.S. 855, 76 S.Ct. 37, 100 L.Ed. 759).

[89]87 S.Ct. 242, 247, 17 L.Ed.2d 149, 156 (rehearing denied 385 U.S. 1020, 87 S.Ct. 698, 17 L.Ed.2d 559).

obligation to let the premises out to petitioner. The action of the respondents in refusing a permit to the petitioner was not directed against the right of free speech or the right of freedom of assembly, but was concerned solely with the use of a portion of premises entrusted to their exclusive control."

In *West Tennessee A.C.L.U. v. City of Memphis* (1971) 323 F.Supp. 234 at 237 the court said:

> "The Court also is of the opinion there is no inherent constitutional right to compel public officials to open municipal buildings to the public for use as an office *even in the exercise of free speech and assembly.* * * *" (emphasis added.)

In 454 F.2d 1162 this case was reversed on the ground that the District Court also had decided that the granting of office space to another organization was beyond the power of the city and that that was a matter of state law to be decided by the state courts. The A.C.L.U. petitioned for a writ of certiorari which this Court denied. 409 U.S. 879.[40] Nothing in the opinion of the Court of Appeal or the denial of ceritorari cast any doubt on the validity of what we have quoted from the opinion of the District Court.

---

[40] 93 S.Ct. 133, 34 L.Ed.2d 133.

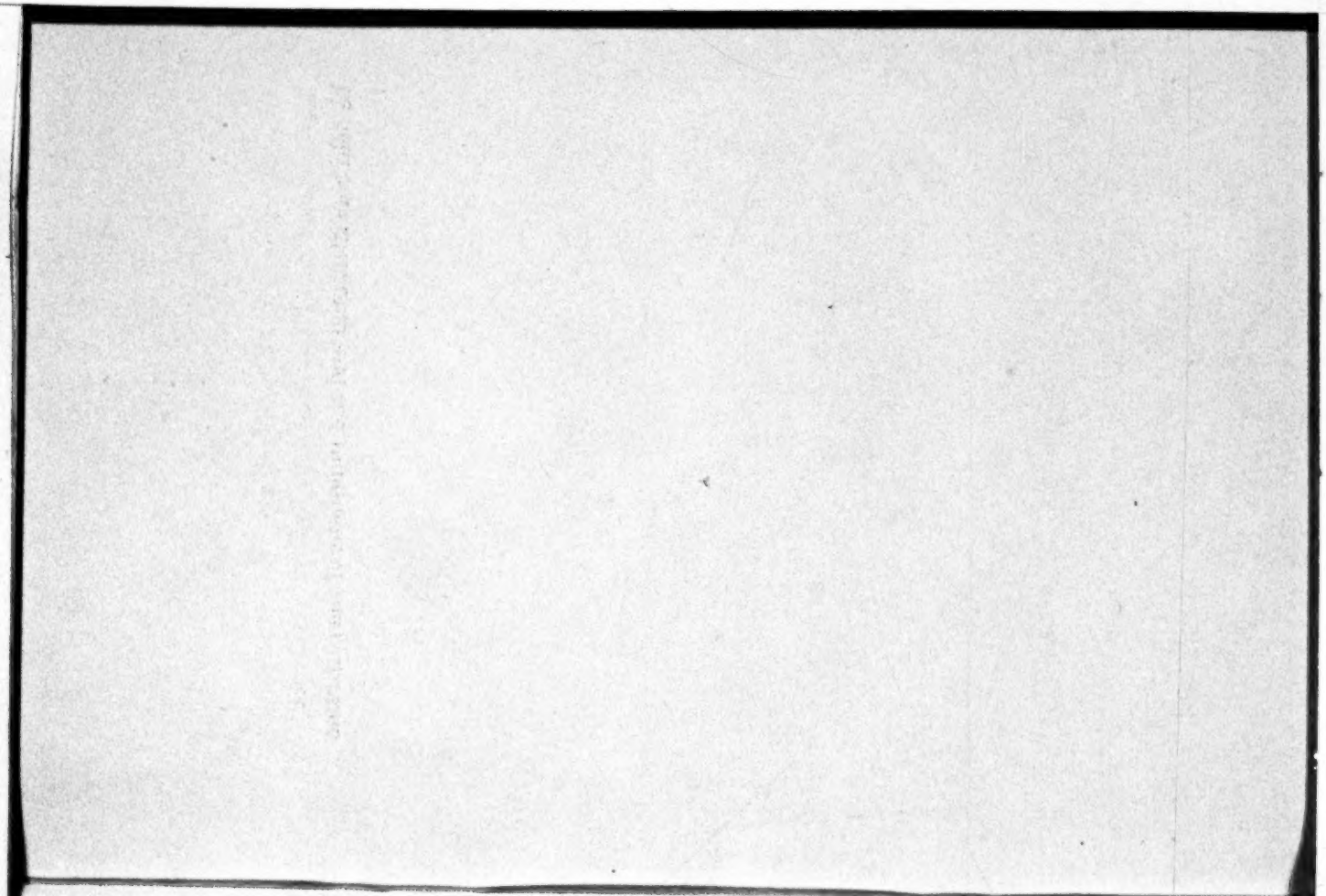
CONCLUSION

It is respectfully submitted that for the reasons herein stated Section 6554 of the Elections Code should be held constitutional and the judgment of the Supreme Court of California affirmed.

Respectfully submitted,

JOHN H. LARSON,
County Counsel

EDWARD H. GAYLORD,
Division Chief
648 Hall of Administration
500 West Temple Street
Los Angeles, California 90012
Attorneys for Respondent



SUPREME COURT, U. S.

FILE

SEP 26

MICHAEL RODAK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 71-6852

DONALD PAUL LUBIN, individually and on behalf of all others similarly situated,

Petitioner,

v.

LEONARD PANISH, Registrar-Recorder of the County of Los Angeles,

Respondent.

REPLY BRIEF

MARGUERITE M. BUCKLEY
226 San Juan Avenue
Venice, California 90291

A. L. WIRIN and FRED OKRAND
ACLU Foundation of Southern California
323 West Fifth Street
Los Angeles, California 90013

Attorneys for Petitioner

John D. O'Loughlin
Jill Jakes

Of Counsel

Washington, D.C. • CLB PUBLISHERS, INC. • (202) 393-0625

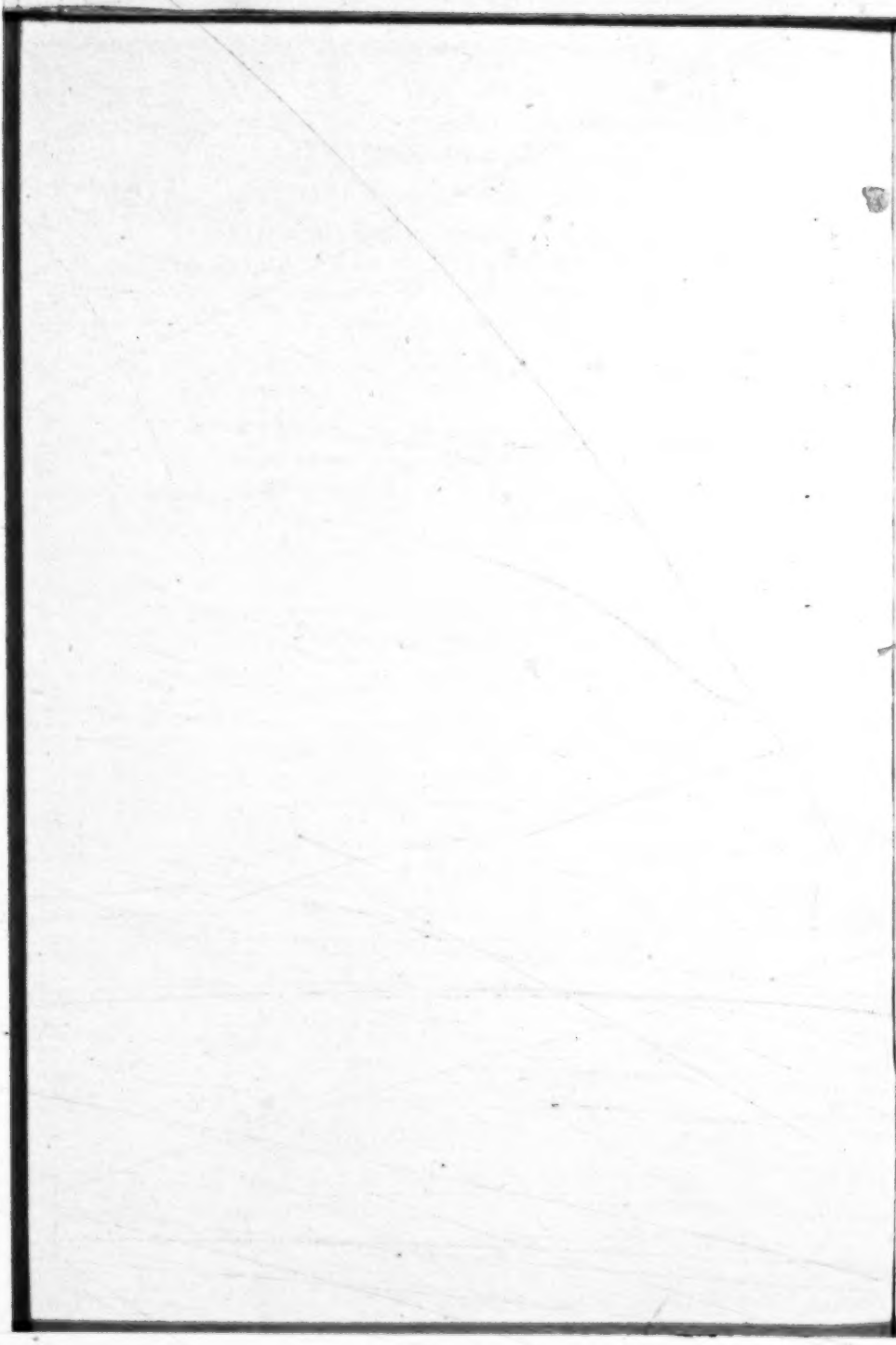


TABLE OF CONTENTS

	Page
I. The State Has No Such Compelling Interest in Filing Fees as to Justify Interfering With Rights Guaranteed by the Constitution to Petitioner and Members of His Class	1
A. The United States Constitution guarantees the right to be a candidate for public office	1
B. There is no compelling state interest in limiting the number of names on the ballot by means of a filing fee requirement which is neither reasonable nor necessary to accomplish that end	3
II. A Filing Fee Is Not a Reasonable Means of Limiting the Ballot to Serious Candidates	4
A. The individual's ability to pay a filing fee does not determine the seriousness of his or her candidacy	4
B. The seriousness of a candidate cannot be judged by the person's ability to win	5
C. Reasonable signature requirements as a test of seriousness or good faith are a realistic alternative to filing fees	8
D. The ability to raise "modest contributions" is not a valid test of the seriousness of a candidate	9
III. Poor People Cannot Be Required To Meet More Stringent Tests Than Those Required of the Average Politicians in Order To Participate in the Electoral Process	10
A. People cannot be discriminated against solely because of their poverty	10
B. Wealth cannot be a required qualification for political office	11

C. Participation in the political process is explicitly guaranteed in the United States Constitution 12

IV. The State and County Bear the Costs of Both Primary and General Elections in California 13

V. The California Filing Fee System Is Not Reasonable 17

A. Filing fees set by Statute are not necessarily reasonable 17

B. Filing fees which are a percentage of the emoluments of an office, unrelated to the costs of the elections or filings of documents connected therewith are not reasonable 18

VI. Petitioner and Members of His Class Are Entitled to a Place on the Ballot If They Qualify in all Other Respects But Are Unable To Pay the Filing Fees 19

A. Petitioner has a right to have his name on the ballot 19

B. California's filing fee system requires payment of fees before write-in votes are counted 20

C. Write-in campaigns are not a meaningful alternative to having one's name printed on the ballot 20

D. California Elections Code §6661(a) places more onerous requirements on write-in candidates 22

VII. There Are No Alternatives To Paying the Filing Fee To Obtain a Place on the Ballot in California 24

VIII. Filing Fee Requirement Impairs the Right of Free Speech 25

CONCLUSION 27

APPENDIX 28

TABLE OF AUTHORITIES

Cases:

Adderley v. Florida, 385 U.S. 39 (1966) 26

Boddie v. Connecticut, 401 U.S. 388 (1971) 10

Brown v. Chote, ___ U.S. ___, 41 L.W. 4548 (1973) (No. 71-1583, October Term 1972) 6, 13, 24

Bullock v. Carter, 405 U.S. 134 (1972) ..... *passim*

Chote v. Brown, 342 F. Supp. 1353 (N.D. Cal. 1972) 6

Ellis v. Dixon, 349 U.S. 458 (1955) 25

Griffin v. Illinois, 351 U.S. 12 (1956) 10, 11

Harper v. Vance, 342 F. Supp. 136 (Ala. 1972) 5, 17

Harper v. Virginia Board of Elections, 383 U.S. 663 (1966) 10

Oregon v. Mitchell, 400 U.S. 112 (1970) 2

Roberts v. Cleveland, 48 N.M. 226, 149 P.2d 120 (1944) 20

San Antonoio Independent School District v. Rodriguez, 410 U.S. ___, 36 L.Ed.2d 16 (1973) 10, 12

Serrano v. Priest, 5 C.3d 584, 96 Cal. Rptr. 601 (1971) 10

State Ex Rel. O'Sullivan v. Swanson, 127 Neb. 806, 257 N.W. 255 (1934) 20

Steiner v. Mihaly, No. SF 22965 (California Supreme Court, October 18, 1972) 24

Wong v. Mihaly, 332 F. Supp. 165 (San Francisco 1971) 4, 21

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 71-6852

DONALD PAUL LUBIN, individually and on behalf of all others similarly situated,

Petitioner,

v.

LEONARD PANISH, Registrar-Recorder of the County of Los Angeles,

Respondent.

REPLY BRIEF

I.

THE STATE HAS NO SUCH COMPELLING INTEREST IN FILING FEES AS TO JUSTIFY INTERFERING WITH RIGHTS GUARANTEED BY THE CONSTITUTION TO PETITIONER AND MEMBERS OF HIS CLASS.

A. The United States Constitution guarantees the right to be a candidate for public office.

Petitioner in his brief has set forth the legal arguments for the proposition that the right to be a candidate is protected by the Constitution. We do not wish to burden this Court unduly by repeating the arguments therein. However, we would re-emphasize this Court's own position at page 142 of *Bullock v. Carter,* 405 U.S. 134 (1972):

"The initial and direct impact of filing fees is felt by aspirants for office, rather than voters, and the Court has not heretofore attached such fundamental status to candidacy as to invoke a rigorous standard of review. However, the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters. . . ."

Although Mr. Justice Harlan and Mr. Justice Brennan disagree in many respects in their opinions in *Oregon v. Mitchell,* 400 U.S. 112 (1970), they both agreed that the right to vote implies the right to be voted for.

In Footnote 19, at page 167, Mr. Justice Harlan said:

". . . I would find it surprising if a State could undercut the right to vote by taking steps to ensure that all candidates are unpalatable to voters of a certain race. Although an explicit provision on officeholding was deleted from the proposed Fifteenth Amendment at the eleventh hour, the idea that the right to vote without more implies the right to be voted for was specifically referred to by supporters of the Fifteenth Amendment in both Houses of Congress. See Cong. Globe, 40th Cong., 3d Sess., 1425-1426 (1869) (Cong. Boutwell); id., at 1426 (Cong. Butler); id., at 1629 (Sen. Sawyer)."

In that same case which dealt so admirably and at such length with political processes under the United States Constitution, Mr. Justice Brennan, disagreeing with Mr. Justice Harlan, at page 252, said:

". . . [O]ur Brother Harlan's view would appear to leave the States free to encourage citizens to case [sic] their votes solely on the basis of race (a practice found to violate the Fourteenth Amendment in *Anderson v. Martin, supra*), or even

presumably to deny Negro citizens the right to run for office at all. We cannot believe that the Equal Protection Clause would permit such discrimination."

B. There is no compelling state interest in limiting the number of names on the ballot by means of a filing fee requirement which is neither reasonable nor necessary to accomplish that end.

Respondent argues that there is a compelling state interest in limiting the number of names printed on the ballot which can only be met by a filing fee requirement. He alleges that the filing fees in California are reasonable. We respectfully disagree with all such assertions.

Petitioner agrees that the state has a legitimate interest in regulating the number of candidates on a ballot. However, respondent does not articulate any reasons which factually establish a *compelling* interest in using this particular means, i.e., onerous filing fees. Since restrictions are imposed on an explicitly-protected constitutional right, the means used must be exercised in a manner consistent with the Equal Protection Clause of the Fourteenth Amendment. *Bullock v. Carter, supra,* at page 141. Filing fees, particularly of the range included in the California filing fee schedules at issue here, are not a legitimate means of meeting the asserted problems because they discriminate against petitioner and members of his class who are poor. The fee of $701.60 is no more reasonable for poor people than the $1,000 filing fee complained of by candidate Carter in *Bullock v. Carter, supra.*

II.

A FILING FEE IS NOT A REASONABLE MEANS OF LIMITING THE BALLOT TO SERIOUS CANDIDATES.

A. The individual's ability to pay a filing fee does not determine the seriousness of his or her candidacy.

Respondent's major arguments are directed to the matter of limiting the ballot, to insure that only "serious" candidates are placed thereon.

This Court in *Bullock v. Carter, supra,* at pages 145, 146 specifically dealt with respondent's contention:

> "... To say that the filing fee requirement tends to limit the ballot to the more serious candidates is not enough. There may well be some rational relationship between a candidate's willingness to pay a filing fee and the seriousness with which he takes his candidacy, but the candidates in this case affirmatively alleged that they were *unable,* not simply *unwilling,* to pay the assessed fees and there was no contrary evidence. It is uncontested that the filing fees exclude legitimate as well as frivolous candidates. And even assuming that every person paying the large fees required by Texas law takes his own candidacy seriously, that does not make him a 'serious candidate' in the popular sense. If the Texas fee requirement is intended to regulate the ballot by weeding out spurious candidates, it is extraordinarily ill-fitted to that goal; other means to protect those valid interests are available."

As Judge Wollenberg so aptly stated in *Wong v. Mihaly,* 332 F. Supp. 165 (1971), at page 168:

> "The proposition that every serious candidate will be able to pay the fee required cannot be accepted without question.... There is, in fact, much to

suggest that money and seriousness of candidacy are not always to be found in the same office seeker. On the other hand, it is clear beyond question here that the man who cannot pay, no matter how serious he is, cannot place his name in nomination."

B. The seriousness of a candidate cannot be judged by the person's ability to win.

Respondent argues at page 4 of his brief:

"... There is no room on the ballot for one who, although actually desirious [sic] of the office for which he files knows that he does not have even a remote chance for nomination or election. No matter how desirous of the office he may be if he knows he has no chance to be either nominated or elected his candidacy is not in good faith."

Respondent, having added a new qualification for holding political office to those set forth in the statutes and State and Federal Constitutions, also neglects to indicate how the payment of a fee relates to a determination that one "knows" he has a chance to be nominated or elected. If such a qualification is added with retroactive effect, a number of officeholders today who won seats in either the California State Legislature or Congress against overwhelming odds would have to resign from their positions since their candidacies were obviously not in good faith.

Whether a person will be nominated or elected is a question to be decided by the voters.

Respondent's theory that the only serious candidate is one who can win is challenged in *Harper v. Vance*, 342 F.Supp. 136, 143 (Ala. 1972). The Court there recognized that a candidate need not intend to win to be serious.

Furthermore, the mere fact that a person is able to afford the filing fee does not mean that he necessarily has substantial support or any chance to be nominated or elected. An excellent example is the Republican Party primary election contest for Governor of California in June 1966–a contest with five candidates and no incumbent. According to his required Statement of Receipts and Expenditures on file in the Secretary of State's office in Sacramento, candidate William Penn Patrick spent approximately $332,000 (including $327,401 of his own funds) on this race, yet received only 1.87% of his Party's vote according to *California Statement of Vote, Consolidated Primary Election, June 7, 1966*, page 6, compiled by Secretary of State Frank M. Jordan. Present California law would allow Mr. Patrick to have his name printed on the ballot because he could afford to pay the filing fee, while it would deny this same right to those otherwise qualified indigent candidates who eventually had their names printed on the 1972 ballot by virtue of the temporary injunction in *Chote v. Brown*, 342 F. Supp. 1353 (N.D. Cal. 1972), sustained by this Court in *Brown v. Chote*, ___ U.S. ___, 41 L.W. 4548 (1973) (No. 71-1583, October Term 1972). Every indigent candidate received a higher percentage of the vote than did Mr. Patrick.

Candidate H. Steve Luce, who ran for Congress in the Democratic primary election in 1972, was one of the poor candidates permitted to file without payment of the fees by the temporary injunction issued in *Chote v. Brown, supra.* According to his required public Statement of Receipts and Expenditures filed with the Los Angeles County Registrar-Recorder, he spent $178 (including $138 of his own funds), considerably under the filing fee of $425, and received 34% of the total votes cast in the Democratic primary, over 17,000 votes.

Thus, respondent's statement:

> "Since the Requirement of a Filing Fee serves a Compelling State Interest, insofar as it may bar a Frivolous Candidate from the Ballot it does not Discriminate against the Poor." (Brief of respondent, page 14)

is not borne out by the facts of elections in California. A large filing fee would bar the candidacy of H. Steve Luce, but does nothing to prevent the running of a William Penn Patrick. And more importantly, who is to make the decision that less than 2% of the vote represents an insignificant or frivolous candidacy?

Petitioner has been unable to find any authority for the proposition that candidates are not entitled to be placed on the ballot when they meet the qualifications set forth in the pertinent statutes and the State and Federal Constitutions. There are no mystical provisions that they must intend to win at this election.

An excellent example of a non-serious, and perhaps even fraudulent, candidate who was allowed to have his name printed on the ballot because a filing fee was paid on his behalf occurred in the May 1, 1973 special election to fill the vacancy in California's 38th Assembly District. In order to confuse voters supporting candidate Frank Vicencia, one of the other candidates convinced a person by the last name of Valencia to enter the race. Valencia asked that his name be listed as "E. 'Frank' Valencia" and that his occupation be listed as "legislative advisor" (as compared to Vicencia's occupational listing of "legislative consultant"). The Secretary of State refused to allow Valencia to use "E. 'Frank' " on the ballot since his nickname was not "Frank", and refused to allow Valencia to use the occupation of "legislative advisor",

since he was actually employed as a draftsman. Valencia never produced any campaign literature, mailed out any press releases, or appeared at any of the candidate forums. None the less, since a $192 fee had been paid on his behalf, county and state officials had to allow his name to be printed on the ballot as "E. Valencia" without any occupational listing.

C. Reasonable signature requirements as a test of seriousness or good faith are a realistic alternative to filing fees.

Filing fees are not a practical test of the good faith of a candidate. Respondent shows a total lack of imagination and research when he states there is no other practical test (Brief of respondent, page 19). Respondent apparently assumes that this Court is unaware that New York State, which is surely comparable in size and complexity to California, has no filing fee requirement.[1] And in this, she is not alone. At least 21 other states have no filing fee requirements. (See petitioner's opening brief, page 19.)

None of these states seem to have had the problems indicated in New Mexico (Brief of respondent, page 4). Perhaps, this is because New Mexico has no signature requirement whatsoever. The good faith of a candidate can in fact be tested by adequate signature requirements. These test the candidate's willingness to go out and do the work required in obtaining signatures. Importantly, they also determine whether there are a specified number of persons willing to sign their names to a nominating petition to place the candidate on the ballot.

---

[1] See *The Consolidated Laws of New York, Election Law.*

D. The ability to raise "modest contributions" is not a valid test of the seriousness of a candidate.

Respondent further argues that all "serious" candidates, regardless of their poverty, will be able to find modest contributions to meet the "reasonable" California fees. First, the fee of $701.60 involved here is not unusual in the California filing fee scheme which includes some higher. To poor and middle-class people alike, such a fee is neither modest nor reasonable. It is in fact very close to those complained of by candidates Carter and Pate in *Bullock v. Carter, supra.*

Second, and most important, modest contributions realistically are not available to many candidates, and most poverty candidates. For instance, in the aforementioned H. Steven Luce election campaign, the poor candidate was able to get 17,000 votes (34% of the total), although he was able to raise only $178 in contributions, including his own of $138.

The reality of "modest contributions" was dramatically indicated by the American citizens' response to the Congressional plan to permit taxpayers to divert a portion of their income taxes to the party of their choice for presidential elections. Despite the fact that there was no cost to the taxpayer and no burden other than to fill out a very simple form and include it with his tax return, there was negligible response. According to a U.P.I. dispatch from Sacramento as printed in the *Valley News & Green Sheet* on July 26, 1973, "Robert Borger of the Sacramento I.R.S. office said nationally about 3% of the taxpayers made such a contribution but in California only about 2.3%, or about 180,000 returns, did so." If only 3% of those who make enough money to file a tax return were willing to make this small effort, it is the height of absurdity to say that a poor person could easily

obtain contributions. The fact remains that campaigns are funded by contributions primarily from rich persons and corporations, legally and illegally (see the Cox investigations) and that such sources are not readily available to poor persons who may challenge the current approach to this country's major problems of war, high taxes, inadequate medical care, environmental waste, poor housing and the like.

III.

POOR PEOPLE CANNOT BE REQUIRED TO MEET MORE STRINGENT TESTS THAN THOSE REQUIRED OF THE AVERAGE POLITICIANS IN ORDER TO PARTICIPATE IN THE ELECTORAL PROCESS.

A. People cannot be discriminated against solely because of their poverty.

This Court has repeatedly said persons cannot be discriminated against because of poverty. *Griffin v. Illinois*, 351 U.S. 12 (1956); *Boddie v. Connecticut*, 401 U.S. 388 (1971); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966).

Respondent makes much of the fact that *Serrano v. Priest*, 5 Cal.3d 584, 487 P.2d 1241 (1971), was impliedly overruled by *San Antonio Independent School District v. Rodriquez*, 410 U.S. ___, 36 L.Ed.2d 16 (1973), since it was mentioned eight times in footnotes. He uses this to show that petitioner's cases are not persuasive. Yet, petitioner cited the *Serrano v. Priest* case for the proposition that classification based upon wealth is a violation of the Equal Protection Clause. The *San Antonio* case did not reverse this proposition. The majority opinion at 36 L.Ed.2d 16, at page 35, held:

"The precedents of this Court provide the proper starting point. The individuals or groups of individuals who constituted the class discriminated against in our prior cases shared two distinguishing characteristics: because of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit."

The opinion then analyzed the cases from *Griffin v. Illinois, supra,* to *Bullock v. Carter, supra.* At page 36, the opinion continues:

"Finally, in *Bullock v. Carter,* 405 U.S. 134, 31 L.Ed.2d 92, 92 S.Ct. 849 (1972), the Court invalidated the Texas filing fee requirement for primary elections. Both of the relevant classifying facts found in the previous cases were present there. The size of the fee, often running into the thousands of dollars and, in at least one case, as high as $8,900, effectively barred all potential candidates who were unable to pay the required fee. As the system provided 'no reasonable alternative means of access to the ballot' [Id., at 149, 31 L.Ed.2d 92], inability to pay occasioned an absolute denial of a position on the primary ballot."

B. Wealth cannot be a required qualification for political office.

Respondent at page 21 of his brief says:

"... Obviously no one has a constitutional right to have his vote counted for a candidate who is ineligible for the office he seeks. By analogy, no one has a constitutional right to have his vote counted for one who fails to qualify as a candidate."

And thereby, respondent has added wealth as a qualification for political office. Obviously, failure to qualify in that context can only mean failure to pay the fee.

Respondent's attitude toward poor persons desiring to become candidates is evident. At page 9 of his brief, he suggests that a poor person in politics must have "in addition to the qualifications required by law, a high degree of integrity, ability, diplomacy, and tact." This is a nice sentiment, and one to be heartily encouraged in view of the spate of indictments and convictions of local, state and federal government officials in the past several years. But the question must be asked, why these qualities are only to be required of the poor and their champions?

C. Participation in the political process is explicitly guaranteed in the United States Constitution.

Respondent appears to argue that the filing fees to be charged for the right to participate as a candidate in the political process are on a par with drivers' licenses and business licenses. However important the rights to these licenses may be, neither are rights explicitly guaranteed by the Constitution.

San Antonio Independent School District v. Rodriquez, supra, held that the importance of a service performed by a state does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause of the Fourteenth Amendment. The determination depends upon explicit guarantees in the Constitution. Thus, the majority opinion was that education, while important, was not explicitly guaranteed by the Constitution and therefore was not within the purview of the Equal

Protection Clause. The Court specifically contrasted political rights which they held were fundamental and explicitly guaranteed.

Under the rationale of *San Antonio Independent School District v. Rodriguez, supra,* the state may in fact have legitimate reasons to tax or control the granting of drivers' licenses and business licenses. However, it is clear, that the *San Antonio* case supports petitioner's basic premises that the rights involved in the political process are of an entirely different magnitude. The state cannot discriminate in these processes just because it has reasonable objectives. Thus, cases dealing with the right to a driver's license or a business license would be at most peripherally related to the constitutionally-protected right to participate in the electoral process.

IV.

THE STATE AND COUNTY BEAR THE COSTS OF BOTH PRIMARY AND GENERAL ELECTIONS IN CALIFORNIA.

Respondent asserts that neither the state nor the county should pay campaign expenses. But they do! The State of California and each county, including Los Angeles, pay the costs of elections, both primary and general. The brief for the Appellant, California Secretary of State, in the case of *Brown v. Chote, supra,* at page 11 states:

> "Nor does California place the burden of financing primary elections on the candidates. Under the California system, the candidate fees reimburse state and local government for only a reasonable portion of the total election cost.[1]"

The footnote read:

"[1] The Secretary of State is budgeted for over one million dollars for election expense of that office in 1972. The total fees forwarded to that office from candidates for Representative in Congress, State Senator, or Assemblyman in connection with the 1972 primary was $171,577.

"The counties print the sample and final ballots, pay the election officers, purchase voting equipment. [Elec. Code §10,000.] Thus, general tax funds provide the primary source of funds to defray election cost at both the state and local level."

Obviously, if the election-cost figures of the Secretary of State are correct (and, as indicated below, there are some reasons to suspect they may be higher), the moneys collected from filing fees are about 10% of the total cost of the elections. The fees are not large enough to pay the cost of conducting the elections, and they are obviously totally unrelated to the cost of filing the forms only. The state is subsidizing primary elections for those who are rich enough to meet the high fee schedule set by the state to keep the poor out of the electoral process.

The costs of elections may in fact be much higher than the amount budgeted in 1972.

According to a story in the *Los Angeles Times* on September 3, 1973, on page 2 of Part I:

"A $19.1 million price tag has been attached to the special election slated for Nov. 6 to decide Gov. Reagan's controversial tax limitation plan. Secretary of State Edmund G. Brown, Jr. said cost estimates from county election officials show they expect to spend $14,192,540 for the election and related costs while the state expects to spend close to $5 million and the cities about $200,000. Earlier cost estimates for the election were lower because they had not

included city and county expenses, Brown said. The Reagan plan would impose a gradually descending lid on the percentage of income the government could take in taxes. It would cut the present 8.75% to slightly more than 7% over the next 15 years."

It follows that although all of the citizens pay the costs of elections indirectly, certain people are not permitted to be subsidized as candidates in either the primary or general elections because they cannot pay the initial filing fee. It then becomes clear that the only justification for the state and county imposition of filing fees is limiting the size of the ballot. And as this Court so aptly noted in *Bullock*, at page 145:

"... To say that the filing fee requirement tends to limit the ballot to the more serious candidates is not enough."

Even the federal government is for the first time subsidizing the cost of future elections through the use of General Revenue Sharing Funds for capital expenditures by local governments for vote recording and vote tabulating devices. (See the affidavit of Lewis B. McCammon, III, attached as Exhibit "A".) Thus, federal moneys intended to benefit the poor as a specified top priority are now being funneled off to support a process from which those very poor people are excluded in a state like California.

Since the state and local governments in fact bear the majority of costs of the election, any filing fee should relate solely to the cost of filing the forms themselves, an amount perhaps as little as $1.00 or as much as $10.00. As this Court observed in Footnote 29 at page 148 in *Bullock v. Carter, supra*:

"This would be a different case if the fees approximated the cost of processing a candidate's

application for a place on the ballot, a cost resulting from the candidate's decision to enter a primary. The term 'filing' fee has long been thought to cover the cost of filing, that is, the cost of placing a particular document on the public record."

This Court then recognized in that same case, at page 148:

"... More importantly, the costs do not arise because candidates decide to enter a primary or because the parties decide to conduct one, but because the State has, as a matter of legislative choice, directed that the party primaries be held. The State has presumably chosen this course more to benefit the voters than the candidates.

"Appellants seem to place reliance on the self-evident fact that if the State must assume the cost, the voters, as taxpayers, will ultimately be burdened with the expense of the primaries. But it is far too late to make out a case that the party primary is such a lesser part of the democratic process that its cost must be shifted away from the taxpayers generally. The financial burden for general elections is carried by all taxpayers and appellants have not demonstrated a valid basis for distinguishing between these two legitimate costs of the democratic process. It seems appropriate that a primary system designed to give the voters some influence at the nominating stage should spread the cost among all of the voters in an attempt to distribute the influence without regard to wealth. Viewing the myriad governmental functions supported from general revenues, it is difficult to single out any of a higher order than the conduct of elections at all levels to bring forth those persons desired by their fellow citizens to govern. Without making light of the State's interest in husbanding its revenues, we

fail to see such an element of necessity in the State's present means of financing primaries as to justify the resulting incursion on the prerogatives of voters."

V.

THE CALIFORNIA FILING FEE SYSTEM IS NOT REASONABLE.

A. Filing fees set by statute are not necessarily reasonable.

Respondent argues that the filing fees of California are reasonable. He argues that the difference between Texas and California is that California filing fees are set by statute, not by political parties. But Texas had a mixed system with some fees set by statute and others by party committees. The fact that the legislature sets fees does not make them reasonable. There is nothing sacred about legislative action. State and federal courts are always passing on the constitutionality of legislative action. Moreover, the fees declared unconstitutional in *Harper v. Vance, supra,* were set by the Alabama statutes.

The real issue is not who sets the fees, but whether they are necessary as well as reasonable. Even a reasonable fee is invalid if it prevents persons from exercising constitutionally-guaranteed rights.

Respondent repeatedly claims that the California fees are "reasonable". He uses the 2% figure as though it were magical. But the reality is that 2% of the Los Angeles County Board of Supervisor's salary which is at issue in the present case is $701.60, a figure close to the $1,000 complained of in *Bullock, supra.* Furthermore, a bill is pending to raise the salary of the Governor in the State of California to $60,000. If it passes, which seems likely, the fee for that office will then be $1,200.

B. Filing fees which are a percentage of emoluments of an office, unrelated to the costs of the elections or filings of documents connected therewith are not reasonable.

Two percent of a salary has no relationship to the cost of conducting an election around that position or any positions. It is based purely on the emoluments of the office. Surely, an election which includes offices such as State Board of Equalization for which a filing fee is charged of $250 (1% of annual salary)[2] and which covers one quarter of the state's population (over 2,000,000 voters), costs more to conduct than an election for Board of Supervisors for which a filing fee of $701.60 is charged and which covers approximately 600,000 voters. Ballots will cost the same, regardless of the emoluments of the offices included thereon. Moreover, the candidates for the State Board of Equalization must file Statements of Receipts and Expenditures with both the County and the State while the candidate for Board of Supervisors need only file with the County.[3] Members of both the State Board of Equalization and the Los Angeles County Board of Supervisors serve four-year terms and both have their filing fees set by the State Elections Code.

This non-relationship between filing fees based on a percentage of salary and the cost of conducting elections is further illustrated in the City of Los Angeles. In January 1973, the filing fee to run for City Council was $340 (2% of annual salary, set by City Charter).

---

[2] *California Elections Code* §6552(b) and *Government Code* §11556.

[3] *California Elections Code* §11564.

Immediately following the elections, the City Council members voted themselves a 76% increase in salary to $30,000 a year. The filing fee for that office is now $600, 76% higher than it was a few months ago. Yet, the costs of conducting city elections have in no way increased by 76%.

Filing fees based on a percentage of emoluments of an office have no relationship to the seriousness of a candidate for that office. Obviously, a candidate who wishes to run for Congress may be as serious as one who wishes to run for Board of Supervisors of Los Angeles County. Yet the fee for the former is only $425 (1% of annual salary) as opposed to $701.60 (2% of annual salary) for the latter.[4]

VI.

PETITIONER AND MEMBERS OF HIS CLASS ARE ENTITLED TO A PLACE ON THE BALLOT IF THEY QUALIFY IN ALL OTHER RESPECTS BUT ARE UNABLE TO PAY THE FILING FEES.

A. Petitioner has a right to have his name on the ballot.

Respondent attempts to avoid the obvious conclusion and application of *Bullock v. Carter, supra,* to California's filing fee system by harping upon the concept of write-in campaigns. Petitioner is not before this Court demanding that his write-in votes be counted. He has the right to have his name *printed* on the ballot, to place his candidacy before the California electorate in a meaningful way, and not to be excluded from effective political participation, solely because of his lack of wealth. *Bullock v. Carter, supra,* at page 149 stated:

---

[4] *Elections Code* §§6552, 6554.

"... by providing no reasonable alternative means of access *to the ballot*, the State of Texas has erected a system which utilizes the criterion of ability to pay as a condition to being on the ballot." (emphasis added)

Respondent argues that there is no legal right to be on the ballot and cites *Roberts v. Cleveland*, 48 N.M. 226, 149 P.2d 120 (1944), and *State Ex Rel. O'Sullivan v. Swanson*, 127 Neb. 806, 257 N.W. 255 (1934). Both cases dealt with the issue of whether a candidate *defeated* in a primary election could then demand a right to be on the general election ballot. This is not even remotely related to the issue of whether a candidate can be kept from the ballot solely because of his lack of wealth and inability to pay a filing fee. There is no analogy possible. There is no constitutional protection for a class composed of persons who have lost an election because they were rejected by the majority of voters who are members of their own political party.

The write-in candidacy is in no way comparable to a place on the ballot.

B. California's filing fee system requires payment of fees before write-in votes are counted.

Although respondent has argued that payment of filing fees are not necessary (Respondent's brief, pages 31, 32), his effort to slough off §18603(b) must surely fail. The statute is plain and means what it says. Although §6555 is not involved in this case, it suffers from the same infirmities as §§6552, 6554, etc.

C. Write-in campaigns are not a meaningful alternative to having one's name printed on the ballot.

Respondent continuously asserts that California's system is not as onerous as the Texas system. But Texas

permitted a candidate to run in the general election without payment of filing fees if the candidate were willing to drop his or her political affiliation. Only the party primaries required fees. Even this was not adequate. As this Court in *Bullock v. Carter, supra,* at page 146, said:

> "Instead of arguing for the reasonableness of the exclusion of some candidates, Appellants rely on the fact that the filing fee requirement is applicable only to party primaries, and point out that a candidate can gain a place on the ballot in the general election without payment of fees by submitting a proper application accompanied by a voter petition. Apart from the fact that the primary election may be more crucial than the general election in certain parts of Texas, *we can hardly accept as reasonable an alternative that requires candidates and voters to abandon their party affiliations in order to avoid the burdens of the filing fees imposed by state law.* Appellants have not demonstrated that their present filing fee scheme is a necessary or reasonable tool for regulating the ballot." (emphasis added)

California will not permit participation in either general or primary elections under any circumstances without the payment of a filing fee. *California Elections Code,* §§6551, 6552, 6554, 6555, 18602 and 18603.

If it is not a reasonable alternative to allow the candidate a place on the ballot without party designation, then a write-in campaign would be even less meaningful.

As Judge Wollenberg said in *Wong v. Mihaly, supra*:

> "... The possibility of a write-in campaign cannot be regarded as a sufficient answer to the problem", page 168.

D. California Elections Code §6661(a) places more onerous requirements on write-in candidates.

Respondent would lead this Court to believe that California law places the same value on a write-in vote as it places on a vote cast for a person whose name is printed on the ballot in primary elections. Such is not the case. California Elections Code §6661 states:

> "No person whose name has been written in upon a ballot for an office at the direct primary may have his name placed upon the ballot as a candidate for that office for the ensuing general election unless one of the following statements is true:
>
> "(a) At that direct primary election he received for that office votes equal in number to 1 percent of all votes cast for the office at the last preceding general election at which the office was filled.
>
> "(b) He is an independent nominee pursuant to Chapter 3 (commencing at Section 6800) of this division.
>
> "(c) He has been designated by a party central committee to fill a vacancy on the ballot for the general election."

Subsections (b) and (c) apply only in the case of candidates for partisan office. Subsection (a) is required of all primary write-in candidates for non-partisan office, including such as petitioner Lubin.

Since candidates whose names are printed on the primary election ballot are not required to obtain any particular percentage of the vote, §6661(a) places an additional requirement on write-in candidates. Under this section, some partisan candidates who won their Party's nominations by write-in were kept off the general election ballot in 1968, as is detailed below.

Peace and Freedom Party write-in candidate Eric Murphy, who received 1,076 votes as the only candidate in his Party's primary in the 9th Senatorial District in June 1968, was not allowed to have his name printed on the general-election ballot as his Party's nominee. He would have been certified as the nominee with only a single vote had his name been printed on the primary ballot, but the minimum number of votes to qualify a candidate by write-in in that district was 2,445.

Even more revealing was the case of the June 1968 primary elections in California's 20th Assembly District, in which the minimum number of votes required to qualify a write-in candidate was 476. The only Peace and Freedom Party candidate, write-in candidate Joseph P. Edmiston, won his Party's primary with 329 votes (10.4% of the 3,147 registered Party Members eligible to vote in the district and about 33% of those who went to the polls). Solely because he was short of the 476 vote minimum required of a write-in candidate, Mr. Edmiston was denied a listing on the general-election ballot as his Party's nominee. Yet, Sivella M. Batey, who received only 101 votes as the sole candidate in the 20th Assembly District's uncontested American Independent Party primary, was certified as the AIP nominee for the general-election ballot, the 476 vote minimum did not primary-election ballot, the 476 vote minimum did not apply. For statistics in the above cases, see *California Statement of Vote, Consolidated Primary Election, June 4, 1968*, pages 3, 16, and *California Report of Registration [and] Number of Voting Precincts for June 4, 1968, Consolidated Primary Election*, page 23, both compiled by Secretary of State Frank M. Jordan.

Undoubtedly this requirement has likewise denied many non-partisan write-in candidates a place on the ballot.

Even if petitioner Lubin and other poor candidates were allowed to run as write-in candidates without prepayment of filing fees, which they are not under §18603(b), they would still be subject to this additional burden.

VII.

THERE ARE NO ALTERNATIVES TO PAYING THE FILING FEE TO OBTAIN A PLACE ON THE BALLOT IN CALIFORNIA.

Respondent's reliance (Brief pages 30, 31) on the California Supreme Court's order in *Steiner v. Mihaly*, No. SF 22965, California Supreme Court, (October 18, 1972), as an alternative to paying filing fees to get write-in ballots counted is misplaced. Respondent would have this Court believe that further such orders could be obtained from a California Court, notwithstanding the provisions of *Elections Code* Section 18603. This interim order was based on the pendency of *Brown v. Chote, supra*, and/or the instant case. The order itself provided for "reserving to this court jurisdiction to determine whether such filing fee prescribed by the aforesaid sections of the Elections Code is lawfully required." (Brief of respondent, page 31.) If this Court should rule that the California filing fees are reasonable, and more importantly, that no poor candidate may run for office without the prepayment of such fees, an order similar to that granted in *Steiner v. Mihaly, supra*, could not be obtained.

Throughout respondent's brief, there has been a noticeable attitude toward the participation in the political process by the disenfranchised. This expressed attitude is one which certain groups have felt from all parts of the establishment: the attitude that people who

do not have enough money to meet adequately the needs of their families will somehow be able to make modest campaign contributions, that they will be able to rise above their circumstances and make great sacrifices to participate in a political system that produces a Watergate, that produces politicians on all levels who use their offices, in corrupt ways; the attitude that requires that those who have had the least advantages under this system should be able to, nay, must rise above it to a higher level of integrity, honesty, diplomacy and tact than those who are the direct beneficiaries of this system. It is precisely this kind of attitude which is causing more and more of the young and old to feel that there is little hope of reforming this system. What this Court does in recognition of the importance of including the disenfranchised, the young, the poor, the Blacks, Chicanos, Indians, Asian-Americans, and women in the political process, will do much to determine whether this system is in fact viable.

VIII.

THE FILING FEE REQUIREMENT IMPAIRS THE RIGHT TO FREE SPEECH.

Respondent refers the Court to *Ellis v. Dixon*, 349 U.S. 458 (1955), and quotes at page 459:

> "Petitioner concedes that a State may withhold its facilities *altogether* from use by non-scholastic groups. . . . " (emphasis added)

The analogy is not apropos. We agree with the proposition that the state may withhold certain facilities as long as it withholds them altogether. *Ellis v. Dixon, supra*, went beyond the statement cited to hold that *once* the state permits the use of its buildings, it cannot

discriminate on an unconstitutional basis among those groups desiring to use the facilities.

If respondent is suggesting that the state may refuse altogether to support a primary system, we might agree that it is possible. We would argue that it is highly improbable, unwise, and perhaps even unconstitutional to withdraw that which has already become an integral part of the electoral process. Once, however, the state determines that it will hold primaries, it cannot withhold that facility on a discriminatory basis. If the state is to finance primaries, as the state and county have conceded that they do, then there can be no discrimination against persons using those facilities because of race, color, sex, religion or *wealth*.

Citing *Adderley v. Florida*, 385 U.S. 39 (1966) (rehearing denied, 385 U.S. 1020), respondent says the right of free speech does not permit the use of publicly-owned property not open to the public (Respondent's brief, page 38). This is a non-sequitur. If respondent means to imply that the ballot box is not open to the public, this confirms the feeling of millions of poor, Blacks, Chicanos, Asian-Americans, Indians, and women. As we have noted in our opening brief, "there is a correlation between income and political participation. The poor do not vote in large numbers." *New York Times* editorial, December 4, 1972, page 38.

The epitomy of the state's position was reached in and 1972 in Watts, probably the poorest community in Los Angeles County and the site of major riots in 1965. There, in the 55th Assembly District, incumbent assemblyman Leon Ralph faced no opposition in either the Democratic primary or in the general election. See the following editions of *Statement of Vote, State of California* compiled by the Secretary of State: "Direct Primary Election, June 2, 1970", page 29, "General

Election, November 3, 1970", page 28, "Consolidated Primary Election, June 6, 1972", page 38, and "General Election, November 7, 1972", page 22.

CONCLUSION

The judgment should be reversed.

Respectfully submitted,

MARGUERITE M. BUCKLEY
226 San Juan Avenue
Venice, California 90291

A.L. WIRIN and FRED OKRAND
ACLU Foundation of Southern California
323 West Fifth Street
Los Angeles, California 90013
Attorneys for Petitioner

Of Counsel:
JOHN D. O'LOUGHLIN
JILL JAKES

EXHIBIT A

AFFIDAVIT OF LEWIS B. NCCAMMON, III

State of California)
) ss.
County of Los Angeles)

I, LEWIS B. McCAMMON, III, reside at 4309 Glenalbyn Drive, Los Angeles, California 90065, telephone number (213) 225-2332, and I state as follows:

I am the editor of "The Grantsmanship Center News", the monthly newsletter published by The Grantsmanship Center, a non-profit corporation ocated at 7815 South Vermont Avenue, Los Angeles. The Center offers training in proposal writing to other non-profit organizations.

On the afternoon of Thursday September 6, 1973, I worked for several hours in the Los Angeles office of the U.S. General Accounting Office on the 7th floor of the Federal Building, 300 N. Los Angeles Street, Los Angeles, gathering information on recent Office of Management and Budget directives establishing uniform grant application procedures for several federal agencies. While there, I noted that G.A.O. personnel were auditing the General Revenue Sharing expenditures of a number of local governments. I later asked Mr. Darryl Dutton of the G.A.O. staff what information his office carried on Revenue Sharing regulations and procedures. Mr. Dutton responded by introducing me to Mr. W.E. Sanchez, the person in charge of the audit then in progress.

Mr. Sanchez and I briefly discussed the sources of information available on Revenue Sharing and Mr. Sanchez asked if I had any specific questions on which he could go into greater detail. I stated that I had read a *Los Angeles Times* article that one of the Los Angeles County

Supervisors thought that it might be possible to use General Revenue Sharing funds to offset the costs to the County of the special statewide tax-initiative election called by the Governor for November 6, 1973, but that I had subsequently heard that this was not permissable. Mr. Sanchez said that there had been no decisions by the Office of Revenue Sharing in this particular area, but that the Los Angeles County Counsel had presented an opinion that such an expenditure would not be legal. He added, however, that a number of local governments had made capital expenditures from Revenue Sharing funds for voting machines and vote tabulating devices, though he stated that he could not tell me specifically which local governments had done so until a study based upon these audits was released publicly this December or early January.

I declare under penalty of perjury that the foregoing is a true, correct, and full account.

/s/ Lewis B. McCammon, III
Lewis B. McCammon, III

Subscribed and sworn to before
me on September 14, 1973,
/s/ Mary A. Quinn
Notary Public in and for the
State of California

(SEAL)

Syllabus

LUBIN v. PANISH, REGISTRAR-RECORDER OF COUNTY OF LOS ANGELES

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

No. 71-6852. Argued October 9, 1973—Decided March 26, 1974

Petitioner, an indigent, was denied nomination papers to file as a candidate for the position of County Supervisor in California because, although otherwise qualified, he was unable to pay the filing fee required of all candidates by a California statute. He brought this class action in California Superior Court for a writ of mandate against the Secretary of State and the County Registrar-Recorder, claiming that the statute, by requiring the filing fee but providing no other way of securing access to the ballot, deprived him and others similarly situated of the equal protection guaranteed by the Fourteenth Amendment and rights of expression and association guaranteed by the First and Fourteenth Amendments. The Superior Court denied the writ of mandate; the Court of Appeal and the California Supreme Court also denied writs. *Held:* Absent reasonable alternative means of ballot access, a State may not, consistent with constitutional standards, require from an indigent candidate filing fees that he cannot pay; denying a person the right to file as a candidate solely because of an inability to pay a fixed fee, without providing any alternative means, is not reasonably necessary to the accomplishment of the State's legitimate interest of maintaining the integrity of elections. Pp. 712-719.

Reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, STEWART, WHITE, MARSHALL, and POWELL, JJ., joined. DOUGLAS, J., filed a concurring opinion, *post*, p. 719. BLACKMUN, J., filed an opinion concurring in part, in which REHNQUIST, J., joined, *post*, p. 722.

Marguerite M. Buckley argued the cause for petitioner. With her on the briefs were *A. L. Wirin* and *Fred Okrand*.

Edward H. Gaylord argued the cause for respondent. With him on the brief was *John H. Larson*.

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to consider petitioner's claim that the California statute requiring payment of a filing fee of $701.60 in order to be placed on the ballot in the primary election for nomination to the position of County Supervisor, while providing no alternative means of access to the ballot, deprived him, as an indigent person unable to pay the fee, and others similarly situated, of the equal protection guaranteed by the Fourteenth Amendment and rights of expression and association guaranteed by the First Amendment.

The California Election Code provides that forms required for nomination and election to congressional, state, and county offices are to be issued to candidates only upon prepayment of a nonrefundable filing fee. Cal. Elections Code § 6551. Generally, the required fees are fixed at a percentage of the salary for the office sought. The fee for candidates for United States Senator, Governor, and other state offices and some county offices, is 2% of the annual salary. Candidates for Representative to Congress, State Senator or Assemblyman, or for judicial office or district attorney, must pay 1%. No filing fee is required of candidates in the presidential primary, or for offices which pay either no fixed salary or not more than $600 annually. Cal. Elections Code §§ 6551, 6552, and 6554.

Under the California statutes in effect at the time this suit was commenced, the required candidate filing fees ranged from $192 for State Assembly, $425 for Congress, $701.60 for Los Angeles County Board of Supervisors, $850 for United States Senator, to $982 for Governor.

The California statute provides for the counting of write-in votes subject to certain conditions. Cal. Elec-

tions Code § 18600 *et seq.* (Supp. 1974). Write-in votes are not counted, however, unless the person desiring to be a write-in candidate files a statement to that effect with the Registrar-Recorder at least eight days prior to the election, *id.*, § 18602, and pays the requisite filing fee, *id.*, § 18603. The latter section provides that "[n]o name written upon a ballot in any state, county, city, city and county, or district election shall be counted for an office or nomination unless . . . [t]he fee required by Section 6555 is paid when the declaration of write-in candidacy is filed . . . ." Thus, the contested filing fees must be satisfied even under the write-in nomination procedures.

Petitioner commenced this class action on February 17, 1972, by petitioning the Los Angeles Superior Court for a writ of mandate against the Secretary of State and the Los Angeles County Registrar-Recorder. The suit was filed on behalf of petitioner and all those similarly situated persons who were unable to pay the filing fees and who desired to be nominated for public office. In his complaint, petitioner maintained that he was a citizen and a voter and that he had sought nomination as a candidate for membership on the Board of Supervisors of Los Angeles County.[1] Petitioner asserted that on February 15, 1972, he had appeared at the office of James S. Allison, then Registrar-Recorder of the County of Los Angeles, to apply for and secure all necessary nomination papers requisite to his proposed candidacy. Petitioner was denied the requested nomination papers orally and in writing solely because he was unable to pay the $701.60 filing fee required of all would-be candidates for the office of Board of Supervisors.

[1] The Board of Supervisors of Los Angeles County is the governing body for Los Angeles County, California. The term is four years, the annual salary $35,080.

The Los Angeles Superior Court denied the requested writ of mandate on March 6, 1972. Petitioner alleged that he was a serious candidate, that he was indigent, and that he was unable to pay the $701.60 filing fee; no evidence was taken during the hearing. The Superior Court found the fees to be "reasonable, as a matter of law." Accordingly, the court made no attempt to determine whether the fees charged were necessary to the State's purpose, or whether the fees, in addition to deterring some frivolous candidates, also prohibited serious but indigent candidates from entering their names on the ballot. The Superior Court also rejected the argument that the State was required by *Bullock* v. *Carter*, 405 U. S. 134 (1972), to provide an alternative means of access to the ballot which did not discriminate on the basis of economic factors.

On March 9, 1972, a second petition for writ of mandate was denied by the Court of Appeal, Second District, and on March 22, 1972, after the deadline for filing nomination papers had passed, the California Supreme Court denied petitioner's third application for a writ of mandate.

Historically, since the Progressive movement of the early 20th century, there has been a steady trend toward limiting the size of the ballot in order to "concentrate the attention of the electorate on the selection of a much smaller number of officials and so afford to the voters the opportunity of exercising more discrimination in their use of the franchise." [2] This desire to limit the size of the ballot has been variously phrased as a desire to minimize voter confusion, *Thomas* v. *Mims*, 317 F. Supp. 179, 181 (SD Ala. 1970), to limit the number of runoff elections, *Spillers* v. *Slaughter*, 325 F. Supp. 550, 553 (MD

[2] H. Croly, Progressive Democracy 289 (1914).

Fla. 1971), to curb "ballot flooding," *Jenness* v. *Little*, 306 F. Supp. 925, 927 (ND Ga. 1969), appeal dismissed *sub nom. Matthews* v. *Little*, 397 U. S. 94 (1970), and to prevent the overwhelming of voting machines—the modern counterpart of ballot flooding, *Wetherington* v. *Adams*, 309 F. Supp. 318, 321 (ND Fla. 1970). A majority of States have long required the payment of some form of filing fee,[3] in part to limit the ballot and in part to have candidates pay some of the administrative costs.

In sharp contrast to this fear of an unduly lengthy ballot is an increasing pressure for broader access to the ballot. Thus, while progressive thought in the first half of the century was concerned with restricting the ballot to achieve voting rationality, recent decades brought an enlarged demand for an expansion of political opportunity. The Twenty-fifth Amendment, the Twenty-sixth Amendment, and the Voting Rights Act of 1965, 79 Stat. 437, 42 U. S. C. § 1973 *et seq.*, reflect this shift in emphasis. There has also been a gradual enlargement of the Fourteenth Amendment's equal protection provision in the area of voting rights:

> "It has been established in recent years that the Equal Protection Clause confers the substantive right to participate on an equal basis with other qualified voters whenever the State has adopted an electoral process for determining who will represent any segment of the State's population. See, *e. g.*, *Reynolds* v. *Sims*, 377 U. S. 533; *Kramer* v. *Union School District*, 395 U. S. 621; *Dunn* v. *Blumstein*, 405 U. S. 330, 336." *San Antonio School District* v.

[3] See Comment, The Constitutionality of Qualifying Fees for Political Candidates, 120 U. Pa. L. Rev. 109 (1971), for a detailed description of each State's filing-fee requirements.

Rodriguez, 411 U. S. 1, 59 n. 2 (1973) (STEWART, J., concurring).

This principle flows naturally from our recognition that

> "[l]egislators are elected by voters, not farms or cities or economic interests. As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system." *Reynolds* v. *Sims*, 377 U. S. 533, 562 (1964) (Warren, C. J.).

The present case draws these two means of achieving an effective, representative political system into apparent conflict and presents the question of how to accommodate the desire for increased ballot access with the imperative of protecting the integrity of the electoral system from the recognized dangers of ballots listing so many candidates as to undermine the process of giving expression to the will of the majority. The petitioner stated on oath that he is without assets or income and cannot pay the $701.60 filing fee although he is otherwise legally eligible to be a candidate on the primary ballot. Since his affidavit of indigency states that he has no resources and earned no income whatever in 1972, it would appear that he would make the same claim whether the filing fee had been fixed at $1, $100, or $700. The State accepts this as true but defends the statutory fee as necessary to keep the ballot from being overwhelmed with frivolous or otherwise nonserious candidates, arguing that as to indigents the filing fee is not intended as a test of his pocketbook but the extent of his political support and hence the seriousness of his candidacy.

In *Bullock* v. *Carter*, 405 U. S. 134 (1972),[4] we recognized that the State's interest in keeping its ballots within manageable, understandable limits is of the highest order. *Id.*, at 144–145. The role of the primary election process in California is underscored by its importance as a component of the total electoral process and its special function to assure that fragmentation of voter choice is minimized. That function is served, not frustrated, by a procedure that tends to regulate the filing of frivolous candidates. A procedure inviting or permitting every citizen to present himself to the voters on the ballot without some means of measuring the seriousness of the candidate's desire and motivation would make rational voter choices more difficult because of the size of the ballot and hence tend to impede the electoral process. That no device can be conjured to eliminate every frivolous candidacy does not undermine the State's effort to eliminate as many such as possible.

That "laundry list" ballots discourage voter participation and confuse and frustrate those who do participate is too obvious to call for extended discussion. The means of testing the seriousness of a given candidacy may be open to debate; the fundamental importance of ballots of reasonable size limited to serious candidates with some prospects of public support is not. Rational results within the framework of our system are not likely

[4] *Bullock*, of course, does not completely resolve the present attack upon the California election statutes because it involved filing fees that were so patently exclusionary as to violate traditional equal protection concepts. Cf. *Rosario* v. *Rockefeller*, 410 U. S. 752, 760 (1973); *James* v. *Strange*, 407 U. S. 128 (1972); *Rinaldi* v. *Yeager*, 384 U. S. 305 (1966). Under attack in *Bullock* was a Texas statute that required candidates to pay a flat fee of $50 plus their pro rata share of the costs of the election in order to get on the primary ballot. Tex. Election Code, Art. 13.07a (Supp. 1974). The assessment of costs involved sums as high as $8,900.

to be reached if the ballot for a single office must list a dozen or more aspirants who are relatively unknown or have no prospects of success.

This legitimate state interest, however, must be achieved by a means that does not unfairly or unnecessarily burden either a minority party's or an individual candidate's equally important interest in the continued availability of political opportunity. The interests involved are not merely those of parties or individual candidates; the voters can assert their preferences only through candidates or parties or both and it is this broad interest that must be weighed in the balance. The right of a party or an individual to a place on a ballot is entitled to protection and is intertwined with the rights of voters.

> "[T]he right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot." *Williams* v. *Rhodes*, 393 U. S. 23, 31 (1968).

This must also mean that the right to vote is "heavily burdened" if that vote may be cast only for one of two candidates in a primary election at a time when other candidates are clamoring for a place on the ballot. It is to be expected that a voter hopes to find on the ballot a candidate who comes near to reflecting his policy preferences on contemporary issues. This does not mean every voter can be assured that a candidate to his liking will be on the ballot, but the process of qualifying candidates for a place on the ballot may not constitutionally be measured solely in dollars.

In *Bullock*, *supra*, we expressly rejected the validity of filing fees as the sole means of determining a candidate's "seriousness":

> "To say that the filing fee requirement tends to limit

> the ballot to the more serious candidates is not enough. There may well be some rational relationship between a candidate's willingness to pay a filing fee and the seriousness with which he takes his candidacy, [footnote omitted] but the candidates in this case affirmatively alleged that they were *unable*, not simply *unwilling*, to pay the assessed fees, and there was no contrary evidence. It is uncontested that the filing fees exclude legitimate as well as frivolous candidates. . . . If the Texas fee requirement is intended to regulate the ballot by weeding out spurious candidates, it is extraordinarily ill-fitted to that goal; [footnote omitted] other means to protect those valid interests are available." 405 U. S., at 145–146. (Emphasis in original.)

Filing fees, however large, do not, in and of themselves, test the genuineness of a candidacy or the extent of the voter support of an aspirant for public office. A large filing fee may serve the legitimate function of keeping ballots manageable but, standing alone, it is not a certain test of whether the candidacy is serious or spurious. A wealthy candidate with not the remotest chance of election may secure a place on the ballot by writing a check. Merchants and other entrepreneurs have been known to run for public office simply to make their names known to the public. We have also noted that prohibitive filing fees, such as those in *Bullock* can effectively exclude serious candidates. Conversely, if the filing fee is more moderate, as here, impecunious but serious candidates may be prevented from running. Even in this day of high budget political campaigns some candidates have demonstrated that direct contact with thousands of voters by "walking tours" is a route to success. Whatever may be the political mood at any given time, our

tradition has been one of hospitality toward all candidates without regard to their economic status.

The absence of any alternative means of gaining access to the ballot inevitably renders the California system exclusionary as to some aspirants. As we have noted, the payment of a fee is an absolute, not an alternative, condition, and failure to meet it is a disqualification from running for office. Thus, California has chosen to achieve the important and legitimate interest of maintaining the integrity of elections by means which can operate to exclude some potentially serious candidates from the ballot without providing them with any alternative means of coming before the voters. Selection of candidates solely on the basis of ability to pay a fixed fee without providing any alternative means is not reasonably necessary to the accomplishment of the State's legitimate election interests. Accordingly, we hold that in the absence of reasonable alternative means of ballot access, a State may not, consistent with constitutional standards, require from an indigent candidate filing fees he cannot pay.

In so holding, we note that there are obvious and well-known means of testing the "seriousness" of a candidacy which do not measure the probability of attracting significant voter support solely by the neutral fact of payment of a filing fee. States may, for example, impose on minor political parties the precondition of demonstrating the existence of some reasonable quantum of voter support by requiring such parties to file petitions for a place on the ballot signed by a percentage of those who voted in a prior election. See *American Party of Texas* v. *White*, *post*, p. 767. Similarly, a candidate who establishes that he cannot pay the filing fee required for a place on the primary ballot may be required to demonstrate the "seriousness" of his candidacy by persuading

a substantial number of voters to sign a petition in his behalf.[5] The point, of course, is that ballot access must be genuinely open to all subject to reasonable requirements. *Jenness* v. *Fortson*, 403 U. S. 431, 439 (1971). California's present system has not met this standard.

Reversed and remanded for further consideration not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE DOUGLAS, concurring.

While I join the Court's opinion I wish to add a few words, since in my view this case is clearly controlled by prior decisions applying the Equal Protection Clause to wealth discriminations. Since classifications based on wealth are "traditionally disfavored," *Harper* v. *Virginia Bd. of Elections*, 383 U. S. 663, 668 (1966), the State's inability to show a compelling interest in conditioning the right to run for office on payment of fees cannot stand. *Bullock* v. *Carter*, 405 U. S. 134 (1972).

The Court first began looking closely at discrimination against the poor in the criminal area. In *Griffin*

[5] It is suggested that a write-in procedure, under § 18600 *et seq.*, without a filing fee would be an adequate alternative to California's present filing-fee requirement. The realities of the electoral process, however, strongly suggest that "access" via write-in votes falls far short of access in terms of having the name of the candidate on the ballot. It would allow an affluent candidate to put his name before the voters on the ballot by paying a filing fee while the indigent, relegated to the write-in provision, would be forced to rest his chances solely upon those voters who would remember his name and take the affirmative step of writing it on the ballot. That disparity would, itself, give rise to constitutional questions and, although we need not decide the issue, the intimation that a write-in provision without the filing fee required by § 18600 *et seq.* would constitute "an acceptable alternative" appears dubious at best.

v. *Illinois*, 351 U. S. 12 (1956), we found that *de facto* denial of appeal rights by an Illinois statute requiring purchase of a transcript denied equal protection to indigent defendants since there "can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Id.*, at 19. In *Douglas* v. *California*, 372 U. S. 353 (1963), we found that the State had drawn "an unconstitutional line . . . between rich and poor" when it allowed an appellate court to decide an indigent's case on the merits although no counsel had been appointed to argue his case before the appellate court. Just recently we found that the State could not extend the prison term of an indigent for his failure to pay an assessed fine, since the length of confinement could not under the Equal Protection Clause be made to turn on one's ability to pay. *Williams* v. *Illinois*, 399 U. S. 235 (1970); see *Tate* v. *Short*, 401 U. S. 395 (1971). But criminal procedure has not defined the boundaries within which wealth discriminations have been struck down. In *Boddie* v. *Connecticut*, 401 U. S. 371 (1971), the majority found that the filing fee which denied the poor access to the courts for divorce was a denial of due process; MR. JUSTICE BRENNAN and I in concurrence preferred to rest the result on equal protection. And it was the Equal Protection Clause the majority relied on in *Lindsey* v. *Normet*, 405 U. S. 56, 79 (1972), in finding that Oregon's double-bond requirement for appealing forcible entry and detainer actions discriminated against the poor. "For them, as a practical matter, appeal is foreclosed, no matter how meritorious their case may be."

Indeed, the Court has scrutinized wealth discrimination in a wide variety of areas. In *Shapiro* v. *Thompson*, 394 U. S. 618, 633 (1969), we found that deterring indigents from migrating into the State was not a constitu-

tionally permissible state objective. Closer to the case before us here was *Turner* v. *Fouche*, 396 U. S. 346, 362–364 (1970), in which the Court found that Georgia could not constitutionally require ownership of land as a qualification for membership on a county board of education. See *Kramer* v. *Union Free School Dist.*, 395 U. S. 621 (1969); *Cipriano* v. *Houma*, 395 U. S. 701 (1969). In *Harper* v. *Virginia Bd. of Elections, supra*, we found a state poll tax violative of equal protection because of the burden it placed on the poor's exercise of the franchise. And in *Bullock* v. *Carter, supra*, we invalidated a Texas filing fee system virtually indistinguishable from that presented here.

What we do today thus involves no new principle, nor any novel application. "[A] man's mere property status, without more, cannot be used by a state to test, qualify, or limit his rights as a citizen of the United States." *Edwards* v. *California*, 314 U. S. 160, 184 (1941) (Jackson, J., concurring). Voting is clearly a fundamental right.* *Harper* v. *Virginia Bd. of Elections, supra*, at 667; *Reynolds* v. *Sims*, 377 U. S. 533, 561–562 (1964). But the

*"No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry* v. *Sanders*, 376 U. S. 1, 17 (1964).

Wesberry involved a federal election. Article I, § 2, of the Federal Constitution declares that Members of the House should be "chosen every second Year by the People of the several States"; and the Seventeenth Amendment says that Senators shall be "elected by the people." But the right to vote in state elections is one of the rights historically "retained by the people" by virtue of the Ninth Amendment as well as included in the penumbra of First Amendment rights. As MR. JUSTICE BRENNAN stated in *Storer* v. *Brown, post*, at 756, "The right to vote derives from the right of association that is at the core of the First Amendment, protected from state infringement by the Fourteenth Amendment." (Dissenting opinion.)

right to vote would be empty if the State could arbitrarily deny the right to stand for election. California does not satisfy the Equal Protection Clause when it allows the poor to vote but effectively prevents them from voting for one of their own economic class. Such an election would be a sham, and we have held that the State must show a compelling interest before it can keep political minorities off the ballot. *Williams* v. *Rhodes*, 393 U. S. 23, 31 (1968). The poor may be treated no differently.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE REHNQUIST joins, concurring in part.

For me, the difficulty with the California election system is the absence of a realistic alternative access to the ballot for the candidate whose indigency renders it impossible for him to pay the prescribed filing fee.

In addition to a proper petitioning process suggested by the Court in its opinion, *ante*, at 718, I would regard a write-in procedure, free of fee, as an acceptable alternative. Prior to 1968, California allowed this, and write-in votes were counted, although no prior fee had been paid. But the prior fee requirement for the write-in candidate was incorporated into the State's Elections Code in that year, Laws 1968, c. 79, § 3, and is now § 18603 (b) of the Code. It is that addition, by amendment, that serves to deny the petitioner the equal protection guaranteed to him by the Fourteenth Amendment. Section 18603 (b) appears to be severable. See *Frost* v. *Corporation Comm'n*, 278 U. S. 515, 525–526 (1929); *Truax* v. *Corrigan*, 257 U. S. 312, 341–342 (1921). The Code itself provides for severability. Cal. Elections Code § 48. That, however, is an issue for the California courts to decide.

I would hold that the California election statutes are unconstitutional insofar as they presently deny access to the ballot. If § 18603 (b) were to be stricken, the Code, as before, would permit write-in access with no prior fee. The presence of that alternative, although not perfect, surely provides the indigent would-be candidate with as much ease of access to the ballot as the alternative of obtaining a large number of petition signatures in a relatively short time. See *Storer* v. *Brown*, *post*, at 738–746. The Court seemingly would reject a write-in alternative while accepting many petition alternatives. In my view, a write-in procedure, such as California's before 1968, satisfies the demands of the Equal Protection Clause as well as most petitioning procedures. I, therefore, join the Court in reversing the order of the Supreme Court of California denying petitioner's petition for writ of mandate and in remanding the case for further proceedings.